Supreme Court, U.S.
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No. 04-589

IN THE

Supreme Court of the United States

THE BRINK'S COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress, consistent with the separation of powers principle and the nondelegation doctrine, can confer on a private party the power to manage a federal entitlement and the power to collect and spend the federal taxes that support it.

2. Whether the Coal Act, 26 U.S.C. §§ 9701-9722, which was invalidated as to certain operators in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), is severable and therefore valid as to remaining operators.

3. Whether the liabilities of the operators who were relieved by *Eastern Enterprises* can be transferred to petitioners and other remaining operators under the Coal Act.

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are The Brink's Company, a publicly held company formerly named The Pittston Company, and nine of its subsidiaries, Buffalo Mining Company, Clinchfield Coal Company, Eastern Coal Corporation, Elkay Mining Company, Jewell Ridge Coal Corporation, Kentland-Elkhorn Coal Corporation, Meadow River Coal Company, Pittston Coal Group, Inc., and Ranger Fuel Corporation (collectively, "Brink's"), which were plaintiffs below.

The respondents are the United States of America, which was defendant below, and Michael H. Holland, Elliot A. Segal, William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Gail R. Wilensky, and Carl E. Horn, Trustees of the United Mine Workers of America Combined Benefit Fund, and the United Mine Workers of America Combined Benefit Fund, which were third-party defendants below.

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PETITION FOR A WRIT OF CERTIORARI

The Brink's Company and its subsidiaries named herein respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 368 F.3d 385 (4th Cir. 2004). The opinion of the district court (App. 42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2004. (App. 1a.) A timely petition for rehearing was denied on August 5, 2004. (App. 66a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 1 of the United States Constitution provides in pertinent part:

> All legislative Powers herein granted shall be vested in a Congress of the United States . . . .

2. Article I, Section 8, Clause 1 of the United States Constitution provides in pertinent part:

> The Congress shall have Power To lay and collect Taxes . . . .

3. Article II, Section 1, Clause 1 of the United States Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America.

4. Article II, Section 3 of the United States Constitution provides in pertinent part:

> [The President] shall take Care that the Laws be faithfully executed . . . .

5. The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722, and 30 U.S.C. § 1232(h), is reproduced at App. 72a.

6. 26 U.S.C. § 7852(a) provides:

> If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.

STATEMENT OF THE CASE

Introduction. Private parties routinely collect taxes from other private parties: sales taxes, excise taxes, withholding taxes—fixed amounts collected as part of some discrete

business activity. But the parties who collect these taxes are not permitted to keep and spend what they collect. Although private parties sometimes take temporary custody of tax dollars, they are not authorized to institute litigation in the courts of the United States to collect taxes owed by other private parties. Nor are they permitted to compromise and settle the federal tax obligations of other citizens.

In the present case, the court of appeals ruled that one private party can collect, manage, and spend federal tax revenues, and that it can sue to enforce the federal tax obligations of other private parties and can compromise and settle those obligations on such terms as it sees fit. Under the statute upheld by the court of appeals, Congress delegated these powers outside the Executive Branch to a private entity that is subject to influence and control by elements of the industry that the private entity is supposed to be managing. This petition challenges the constitutionality of that arrangement.

Under the Coal Industry Retiree Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-9722, 30 U.S.C. § 1232(h), a private entity—the United Mine Workers of America Combined Benefit Fund—manages a new federal entitlement and enforces the federal tax obligation that finances it. The decision of the court of appeals upholding this delegation of power to a private entity is in direct conflict with holdings of this Court that the administration of the nation's laws is the exclusive responsibility of the President and that the enforcement of obligations owed to the United States is an essential executive function. *Printz v. United States*, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed . . . .'"); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of

'execution' of the law."); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for the breach of the law . . . .").

The court of appeals also declared that the Coal Act is severable even though this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), had the effect of relieving hundreds of operators of their funding obligations for thousands of beneficiaries under the statute. The court of appeals held that the Coal Act is still functional because the obligations of the relieved operators can simply be transferred to the remaining operators (including petitioners) and to the Abandoned Mine Reclamation Fund ("AML Fund"), notwithstanding the text of the statute and 26 U.S.C. § 7852(a). (App. 22a.) Chief Judge Wilkins dissented from the panel's decision to allow *Eastern* beneficiaries to be "reassigned" to petitioners. (App. 37a.)

Given the importance of these issues, and of maintaining a separation and balance of powers, petitioners seek a writ of certiorari.

The Coal Act. The Coal Act entitles certain union retirees and their dependents to lifetime health care benefits. The program is funded by taxes on former employers and by transfers from the AML Fund. Under the Act, these payments are made, not to a governmental officer or agency, but to a newly created private entity, the United Mine Workers of America Combined Benefit Fund ("UMWA Combined Fund"). To date, the petitioners have paid over $110,000,000 in taxes under the Act.

As the Congressional Research Service has reported, the UMWA Combined Fund is a private plan that collects and spends federal revenues. N. Noto, *Budget Treatment of the*

UMWA Retiree Health Benefit Program, No. 93-979E (1993) (App. 113a). "The premiums that companies must pay . . . are treated as revenues of the Federal Government and expenditures . . . as Federal outlays." (*Id.*) The UMWA Combined Fund administers a federal entitlement for statutory beneficiaries and enforces a federal obligation against federal taxpayers. (App. 120a.)

The primary proponents of the legislation were the United Mine Workers of America ("UMWA") and Bituminous Coal Operators' Association ("BCOA"), which formed a formal coalition to lobby for the law. (Court of Appeals ("C.A.") App. 1485, 1523.) The primary opponents of the law were the Private Benefits Alliance ("PBA"), a group of nonunion operators opposed to any industry-wide tax, and the so-called "reachback" companies, a collection of union operators who were not signatories to the 1988 National Bituminous Coal Wage Agreement ("NBCWA") between the UMWA and BCOA. Through legislation, the UMWA and BCOA wanted to shift a portion of their liability for retiree health care to the rest of the industry. (C.A. App. 2569.) The PBA and reachback companies resisted.

The two sides blamed each other for the "financial crisis" that the collectively bargained UMWA Benefit Funds were experiencing. The UMWA and BCOA contended that the deficits were caused by the operators who left the coal business and stopped contributing to the funds. (C.A. App. 2555.) The PBA and reachback companies saw things differently. They blamed the deficits on artificially low contribution rates under the 1988 NBCWA. (C.A. App. 2561, 2568-69.) In the 1988 NBCWA, BCOA contractually promised to raise rates as necessary to pay for the specified benefits, but, when the time came to raise rates, the BCOA refused to honor its commitment. *McGlothlin v. Connors*, 142 F.R.D. 626 (W.D. Va. 1992) (ordering increased contributions).

For its part, the UMWA was content to let the "crisis" develop. It knew that legislation offered the best hope of avoiding "all out war" with BCOA when the 1988 NBCWA expired. (C.A. App. 1507.) Absent such legislation, the UMWA Funds would have to be financed by voluntary contributions negotiated through collective bargaining with BCOA. The UMWA strategy was "to create an atmosphere of urgency that politically threatens neutral or opposing legislators and economically threatens the communities of their constitutuents [sic] so as to make supporting our legislation imperative . . . ." (App. 143a-144a.) Under the UMWA plan, a "time table" was established to hire lobbyists and "[d]iscuss 'crisis' management." (App. 149a.) In due course, the crisis would be "announced," and the "[p]ublic relations campaign" would begin. (App. 150a.) Soon thereafter, the "[c]risis situation" would "worsen," and Congress would hold hearings. (*Id.*) Finally, according to the script, when the "crisis situation worsens and threatens disaster," Senator Rockefeller would introduce the bill. (*Id.*)

The plan worked. Responding to the crisis, Congress passed the Coal Act, and the President signed the bill into law in the fall of 1992. The Coal Act abolished the collectively bargained Benefit Funds and replaced them with a new statutory entity—the UMWA Combined Fund.

The Executive Branch is assigned four functions under the Coal Act. First, the Commissioner of Social Security has the duty to calculate a per beneficiary health benefit premium for each plan year. 26 U.S.C. § 9704(b)(2). Second, the Secretary of the Interior has the duty to make certain annual transfers from the AML Fund to the UMWA Combined Fund. 26 U.S.C. § 9705(b); 30 U.S.C. § 1232(h). Third, the Commissioner of Social Security is responsible for assigning beneficiaries to former employers based on a specific statutory formula. 26 U.S.C. §§ 9706(a), 9706(f). And fourth, the

Secretary of the Treasury may impose statutory penalties on assigned operators who do not pay. 26 U.S.C. § 9707.

Apart from these specific duties, the general responsibility for managing and enforcing the law has been delegated to the UMWA Combined Fund. Indeed, one of the express policies of the Act is "to provide for the continuation of the privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. 102-486, § 19142, 106 Stat. 3037. (App. 77a.)

Private parties are given the power to appoint the trustees of the UMWA Combined Fund. 26 U.S.C. § 9702(a)(1). The President has no role in their selection. The board consists of seven individuals who are selected as follows:

> (A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;
>
> (B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;
>
> (C) two individuals designated by the United Mine Workers of America; and
>
> (D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

26 U.S.C. § 9702(b)(1). "A successor trustee is appointed in the same manner as the trustee being succeeded." 26 U.S.C. § 9702(b)(2). Every trustee serves at the pleasure of the party who appointed him or her. "Any party or parties that have the power to appoint a Trustee may remove that Trustee, at any time and for any reason." (App. 125a.)

Thus, the UMWA/BCOA coalition that sought passage of the Coal Act can control the composition of the board. Three out of the four initial trustees are appointed by the UMWA

and BCOA. One trustee is appointed by the three "reach-back" companies with the largest number of assignments, Brink's being one of those companies. The four initial trustees, by majority vote, can select (and remove) the three remaining "Neutral Trustees." (App. 125a.)

The trustees are given the power to "create a new private plan known as the United Mine Workers of America Combined Benefit Fund." 26 U.S.C. § 9702(a)(1). The Coal Act states that the UMWA Combined Fund is "a plan described in section 302(c)(5) of the Labor Management Relations Act," 29 U.S.C. § 186(c)(5), "an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974," 29 U.S.C. § 1002(1), and "a multiemployer plan within the meaning of section 3(37) of such Act," 29 U.S.C. § 1002(37). As one witness testified, however, calling the UMWA Combined Fund a multiemployer ERISA plan is "a nonsequitor." (C.A. App. 1857.) By definition, an ERISA plan is created by agreement of the participants; the UMWA Combined Fund, on the other hand, was created by Act of Congress, and participation is a mandatory, government imposed obligation. (C.A. App. 1857-58.)

Under the trust document, the trustees gave themselves wide powers and authority. Pursuant to the Coal Act and ERISA, they "have the full and exclusive authority to determine all questions of coverage and eligibility (not determined by the [Commissioner]) . . . ." (App. 129a.) They also have "full discretionary power to construe the provisions" of the trust document and plan. (*Id.*) They are "empowered to make reasonable rules and regulations" and "to do all acts which they deem necessary or proper" to carry out the trust. (*Id.*.) The trust document goes on to list dozens of specific powers relating to the delivery of benefits, control of assets, and asset management. (App. 129a, 131a, 132a.) These

powers include full discretionary power over the enforcement of Coal Act obligations and specific authority:

> To compromise, compound and settle any debt or obligation due from third persons . . . ; [and]
>
> To enforce any right, obligation or claim in their absolute discretion and . . . in their absolute discretion to abstain from the enforcement of any right, obligation or claim . . . .

(App. 132a, 133a.)

In practice, the UMWA Combined Fund makes significant decisions that affect different operators in different ways. (App. 151a-156a.) For example, the Fund determines the eligibility of large classes of individuals. If an individual is deemed eligible, someone is assigned to provide benefits. If the beneficiary cannot be assigned under the statutory criteria, the beneficiary is placed in the unassigned pool, which is funded by transfers from the AML Fund and by an "unassigned beneficiaries premium." 26 U.S.C. § 9704(d). From the perspective of petitioners and other reachback companies, the trustees "have exercised their discretion in ways that are difficult to explain other than as an effort to benefit one or more of the Appointing Parties." (App. 172a.)

The UMWA Combined Fund also exercises complete control over the enforcement of Coal Act obligations. It decides whether to sue, whom to sue, how much to settle for, and how any settlement should be structured. (App. 132a-133a; C.A. App. 1975-1991, 2022-2023.) For example, the UMWA Combined Fund required petitioners to dismiss cases that they had against the UMWA and the BCOA in order to settle an entirely separate claim that the UMWA Combined Fund had against petitioners. (C.A. App. 1183-1249, 1607, 2313-2315.) Although the UMWA Combined Fund was not a party to the case that petitioners had against the UMWA (for breach of contract) or to the case that petitioners had against

BCOA (for misrepresentation and fraud), the UMWA Combined Fund nevertheless demanded, at the insistence of the UMWA and BCOA, that petitioners give up these cases in order to settle the UMWA's Combined Fund's so-called "evergreen" claim. (*Id.*) Because the evergreen claim was a "bet-the-company" case, petitioners were forced to accept the Fund's demand. (C.A. App. 1607.)

The first question presented by this petition for a writ of certiorari is whether authority of this kind can be delegated to a private party. The second and third questions, involving severability and principles of statutory construction, arise directly from this Court's decision in *Eastern Enterprises*.

The *Eastern Enterprises* Decision. In *Eastern Enterprises*, the Court held the Coal Act invalid as to an assigned operator that had not signed the 1974 or any later NBCWA. Justice O'Connor, joined by the Chief Justice and Justices Scalia and Thomas, declared that the Coal Act constituted a taking, and Justice Kennedy, concurring in the judgment and dissenting, concluded that the Act violated due process. 524 U.S. at 538, 550.

Following that decision, the Commissioner "voided" the assignments to Eastern Enterprises and to "similarly situated" operators, i.e., those who had not signed the 1974 or any later NBCWA. As a result, over 100 companies were relieved of liability for over 8,000 beneficiaries. *Apogee Coal Co. v. Holland*, 296 F.3d 1294, 1297 (11th Cir. 2002); General Accounting Office Report No. 02-243, *Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue* 5 (Apr. 2002). At the time, the total population of the UMWA Combined Fund was approximately 70,000.

The Commissioner then initiated a process to "reassign" these *Eastern* beneficiaries to remaining operators. Although the statute requires that assignments be made to "the signatory operator which employed the coal industry retiree

in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement," and although all the beneficiaries in question had all been properly assigned to Eastern Enterprises and companies like it under the terms of the statute, the Commissioner departed from the text of the statute and made assignments to the remaining signatory operators which had employed the retirees for the *next* longest periods of time. *Cf.* 26 U.S.C. § 9706(a)(3). Where no such employers were still in business, the Commissioner placed the beneficiaries in the unassigned pool.

This reassignment process has affected petitioners in three ways. First, petitioners have been assigned 95 additional beneficiaries and have been made to pay health benefits for these beneficiaries for all plan years from the beginning of the Coal Act to present. Second, the influx of beneficiaries into the unassigned pool required the reallocation of funds that had been used to pay death benefits, thus requiring petitioners and other operators to pay death benefit premiums that otherwise would not have been due. Third, the additional burden on the unassigned pool has resulted in an unassigned beneficiaries premium. As a result, petitioners have been forced to pay several million dollars over and above what the Act requires.

As amended, the complaint in this case seeks a refund of all amounts paid to the Combined Fund because (1) the Coal Act constitutes an unconstitutional delegation of government power to a private entity and (2) the Coal Act is not severable following *Eastern Enterprises*. In the alternative, Brink's seeks a refund of the additional liabilities imposed on it as a result of the *Eastern* decision.

Federal jurisdiction is based upon 28 U.S.C. § 1346(a)(1), allowing actions against the United States "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . or any sum alleged to

have been excessive or in any manner wrongfully collected under the internal-revenue laws." *See Pittston Co. v. United States*, 199 F.3d 694, 701-03 (4th Cir. 1999) (prior appeal). The district court also had jurisdiction under the Coal Act and 28 U.S.C. § 1331. *See Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 300-03 (4th Cir. 2000), *aff'd*, 534 U.S. 438 (2002).

REASONS FOR GRANTING THE WRIT

All courts of appeal considering the issue have held that Coal Act premiums are taxes. *Pittston*, 199 F.3d at 702; *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 675 (3d Cir.), *cert. denied*, 538 U.S. 963 (1999); *In re Sunnyside Co.*, 146 F.3d 1273, 1278 (10th Cir. 1998); *In re Chateaugay Corp.*, 53 F.3d 478, 498 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995). Yet, the court of appeals in the present case saw no problem in giving a private party the power to enforce tax obligations against other private parties. Nor did the court of appeals find any barrier to granting a nongovernmental entity the authority to administer a federal entitlement.

This ruling has implications far beyond the Coal Act. If the management of federal programs and the enforcement of federal tax obligations can be delegated to private parties, what functions cannot be delegated outside government?

This Court has been deferential to delegations by Congress to members of the Executive Branch. "In short, we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)). But this deference has never been applied to delegations to private parties. The separation of powers principle will be significantly eroded if executive powers can be conferred upon non-Executive actors, as is the case with the Coal Act.

I. THE DECISION OF THE COURT OF APPEALS PERMITS THE DELEGATION OF GOVERNMENTAL POWER TO A PRIVATE ENTITY

The court of appeals posited that "ministerial" or "advisory" functions can be conferred on private parties without violating the separation of powers principle or the nondelegation doctrine. (App. 15a.) The court then analyzed the functions performed by the UMWA Combined Fund and concluded that they are all "ministerial" or "advisory." (App. 22a.) Based on that characterization, the court concluded that the Coal Act is constitutional.

While it is important to examine the nature of the duties being conferred on a private actor, the Constitution itself supplies the applicable standard. Article II states that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const., Art. II, § 1. The President, it says, "shall take Care that the Laws be faithfully executed . . . ." *Id.* Art. II, § 3. Correspondingly, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." *Id.* Art. I, § 1. There is no provision permitting a delegation of these powers. *Whitman*, 531 U.S. at 472. The question, therefore, is whether the UMWA Combined Fund is exercising executive or legislative power. If it is, the delegation cannot stand.

The Court has not attempted a comprehensive definition of executive power, but it has given some concrete examples of it. In *Buckley*, the Court held that the Congress cannot confer on non-Executive actors the "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights." 424 U.S. at 138. "A lawsuit," the Court noted, "is the ultimate remedy for a breach of the law," and that remedy must be exercised (or not) by the President. *Id.* at 140.

The court of appeals concluded that the UMWA Combined Fund has merely "the power to sue for monies owed to itself, which is not a governmental power, but a private one." (App. 18a.) With respect, petitioners note that the UMWA Combined Fund is not collecting contractually owed contributions, but government imposed taxes. Coal Act obligations are "revenues of the Federal Government," and Coal Act expenditures are "Federal outlays." (App. 113a.) The court of appeals failed to recognize that "[d]ifficult and fundamental questions" are involved in allowing a private litigant the right to sue to collect public funds. *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

In *Bowsher*, the Court struck down the Gramm-Rudman-Hollings Act because it assigned to the Comptroller General, an officer removable only by Congress, the duty of calculating what budget cuts should be made. The Court rejected the argument that the duties of the Comptroller General were "ministerial" and not executive in nature. The interpretation and implementation of a statute, the Court said, are "the very essence of 'execution' of the law." 478 U.S. at 733.

In *Printz*, the Court declined to allow Congress to confer on state actors the responsibility for conducting background checks under the Brady Act. Because the execution of the nation's law is exclusively the President's responsibility, the Act was found to violate Article II, as well as principles of federalism. The case did not turn on whether the duties were "ministerial," but whether they constituted the administration of the law. 521 U.S. at 922-23.

The UMWA Combined Fund is charged with executing the Coal Act. It provides benefits. It determines issues of eligibility. And it enforces the law against taxpayers. These are responsibilities of the President.

The UMWA Combined Fund also exercises a degree of legislative authority. Specifically, the UMWA Combined Fund is permitted to write its own rules for implementing the Coal Act. 26 U.S.C. § 9702(a)(1) (directing the trustees "to create a new private plan"). While the statute would pass the familiar "intelligible principle" test were the delegation to the President, the Court has not applied that test to private delegations. Rather, the Court has categorically rejected transfers of regulatory power to interested parties, stating that such transfers are delegations in their "most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935); *cf. Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (finding no delegation of legislative authority to a private entity when the private entity functioned subordinately to a government agency and the government agency had primary responsibility for administering the law).

Unlike delegations to public bodies, delegation of government powers to private parties—especially where those parties can use government powers to the disadvantage of others—raises concerns about arbitrariness and self-dealing. These concerns are rooted in notions of due process of law, raising a constitutional bar lest private self-interest lead to a misuse of government powers. *See Carter*, 298 U.S. at 311; *cf. Tumey v. Ohio*, 273 U.S. 510 (1927) (due process prohibits judge from being paid for his services with a share of fines levied and collected); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (due process requires recusal of state supreme court justice engaged in litigation related to matter before his court).

In any event, the functions of the UMWA Combined Benefit Fund are not "ministerial" or "advisory," as those terms are commonly understood. The trust document itself defines the trustees' authority as "discretionary" and

"absolute." (App. 129a, 133a.) Applying ERISA standards does not negate trustee authority; it confirms it. The "prudent man rule" for fiduciaries under ERISA demonstrates the exercise of judgment and discretion, as does the very term "fiduciary," which means a person who "exercises any discretionary authority or discretionary control respecting management" of the plan. 29 U.S.C. §§ 1002(21)(A), 1104(a)(1)(B). While the Pension and Welfare Benefits Administration can, of course, investigate and take enforcement action against violations of ERISA by the UMWA Combined Fund, (App. 184a), the primary responsibility for administering the Coal Act rests with the UMWA Combined Fund, not with any officer or agency of government.

Nor can the constitutional issue be avoided by attempting to analogize Coal Act liability to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1986 ("MPPAA"), 29 U.S.C. §§ 1381-1461, as the court of appeals did. (App. 19a-20a.) The Coal Act did not attempt to preserve the old collectively bargained health care system; it abolished it. The Coal Act does not codify preexisting contractual obligations; rather, it imposes a new tax on former employers.

All circuits considering the issue have held that Coal Act obligations are taxes. Giving a private party the discretionary authority to collect and spend taxes raises a fundamental constitutional issue worthy of this Court's attention.

II. THE FUNDING PROVISIONS OF THE COAL ACT ARE NOT SEVERABLE

In *Eastern Enterprises*, the Court invalidated the Coal Act as to an operator which had been assigned beneficiaries under the third tier of 26 U.S.C. § 9706(a)(3), a so-called "super reachback" company. The Court declined to rule on the validity of the remainder of the law. 524 U.S. at 538 (citing *Printz*, 521 U.S. at 934-35). The cited passage from *Printz*

states that the Court will not decide issues of severability when the remaining portion of a statute does not apply to the plaintiffs before the Court. 521 U.S. at 935.

After the decision in *Eastern Enterprises*, the Commissioner and the UMWA Combined Fund took a number of steps to fill the funding void caused by that decision. Specifically, the 8,000 beneficiaries that had been assigned to Eastern Enterprises or companies like it were "reassigned" to other companies or were placed in the unassigned pool. The companies receiving these new assignments were then charged health care premiums retroactively to the inception of the Coal Act. Remaining operators were also charged death benefit premiums and unassigned beneficiaries premiums that otherwise would not be due. *See Apogee*, 296 F.3d at 1297-98. The Secretary of the Interior has also made additional transfers of AML money to help defer the increased costs of the unassigned beneficiaries. This entire reallocation and reassignment process has occurred without any statutory authority.

The Coal Act provides for assignment of beneficiaries in a carefully prescribed order: First, to the signatory operator which was a signatory to the 1978 NBCWA and was the most recent operator to employ the retiree for at least two years. 26 U.S.C. § 9706(a)(1). Second, to the signatory operator which was a signatory to the 1978 NBCWA and was the most recent operator to employ the retiree, without regard to length of employment. 26 U.S.C. § 9706(a)(2). Third, to the signatory operator which employed the retiree for a longer period of time than any other operator prior to the 1978 NBCWA. 26 U.S.C. § 9706(a)(3).

The statute thus creates priorities among tiers and within tiers. An operator is not liable under the second tier if the beneficiary is assignable under the first tier, and an operator is not liable under the third tier if the beneficiary is assignable under the second tier. Likewise, an operator is not liable

under tiers one or two if it is not "the most recent" employer, and an operator is not liable under the third tier if it did not employ the retiree "for a longer period of time than any other signatory operator."

A beneficiary is "unassigned" only if "no existing company falls within the aforementioned categories." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 447 (2002); *see* 26 U.S.C. §§ 9701(c)(5), 9704(d).

An operator may request the Commissioner to review an assignment for "error." 26 U.S.C. § 9706(f). If the Commissioner determines that an assignment is "in error," the Commissioner "shall review the beneficiary's record for reassignment under subsection (a)." 26 U.S.C. §§ 9706(f)(2), 9706(f)(3). "[S]ubsection (a)" is § 9706(a), which establishes the three tiers for assignments. It is clear, therefore, that "error" means a factual mistake in identifying the correct signatory operator under § 9706(a). "Error" does not mean a constitutional error of Congress in writing the statute. There is no provision authorizing the Commissioner to make assignments other than by § 9706(a), and there is no provision authorizing the Commissioner or the Combined Fund to declare a beneficiary unassigned if there is an operator "to which liability . . . is assigned under section 9706." 26 U.S.C. § 9701(c)(5).

With this background, a court considering severability must answer two questions: (1) whether the Act is functionally and structurally capable of severance and (2) whether Congress would have enacted the law notwithstanding its invalid applications. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932). A severability clause raises a presumption that the law is severable, but this presumption will not save a statute that is functionally incapable of severance. *Reno v. ACLU*, 521 U.S. 844, 882 (1997). Nor does the presumption apply where there is strong

evidence that Congress "would not have enacted those provisions which are within its power independently of that which is not." *Champlin*, 286 U.S. at 234.

The severability clause in this case does not save the Coal Act; it dooms it. The clause states that if "the application" of the Coal Act to any person is held invalid, "the application" of the law to other persons "shall not be affected thereby." 26 U.S.C. § 7852(a). Following *Eastern Enterprises*, the only way the UMWA Combined Fund can continue to function is by changing "the application" of the Act to other persons, by increasing the liabilities of the remaining operators and the AML Fund. This is precisely what the severability clause forbids.

The court of appeals held (2-1) that the beneficiaries formerly assigned to Eastern Enterprises and similar operators can be reassigned to other operators. (App. 22a.) In the alternative, the court of appeals said, these beneficiaries can all be placed in the unassigned pool. (App. 27a.) Neither result, however, is consistent with the text of the Coal Act. The Coal Act directs that the beneficiaries be assigned to Eastern Enterprises and companies like it—and that is where the Commissioner assigned them. Beneficiaries cannot be classified as unassigned if there are operators to which the beneficiaries should be assigned under § 9706(a). As the Court stated in *Sigmon*, Congress "did not delegate authority to the Commissioner to develop new guidelines or to assign liability in a manner inconsistent with the statute." 534 U.S. at 462. The Commissioner and the UMWA Combined Fund have attempted to make the Act function following *Eastern Enterprises*, but they have not done so in a way that is consistent with the language of the Act, nor in a way that complies with the severability clause.

Nor is the result consistent with the intent of Congress in enacting the Coal Act. Congress said that it intended to revise the existing UMWA health care system "to identify

persons most responsible for plan liabilities." (App. 77a.) The "most responsible" persons are identified in § 9706. For the *Eastern* beneficiaries, petitioners are not the "most responsible" persons under the statute.

The Act was a "bipartisan compromise," the "essence" of which was expanded reachback liability for former signatories. 138 Cong. Rec. S17603, 17612 (daily ed. Oct. 8, 1992) (Conf. Rep.). The added signatories became known as "super reachbacks," as their contracts predated the 1978 NBCWA. The super reachback liability replaced the so-called "industry-wide tax," which had been a feature of earlier legislative proposals. 138 Cong. Rec. S10783 (daily ed. July 29, 1992) (Sen. Rockefeller).

There was no Coal Act without the super reachbacks. Yet, the decision in *Eastern Enterprises* largely eliminates that category of funding. From the findings and policies of the statute and the legislative record, it is unlikely that what remains of the Coal Act would have been passed independently of what was actually enacted.

It is true, as the court of appeals pointed out, that subsequent Congresses have made stop-gap appropriations to the UMWA Combined Fund following *Eastern Enterprises*. *See* Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 501, 113 Stat. 1501, 1501A-214 (1999); Dept. of Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, § 701, 114 Stat. 922, 1024 (2000); Consolidated Appropriations Resolution, 2003, Pub. L. 108-7, 117 Stat. 11, 245-46 (2003). The fact that the 106th Congress put more money into the Combined Fund "in response to rising health care costs and recent court decisions" does not mean that the 102nd Congress would have enacted the statute as it currently exists. H.R. Rep. No. 106-406 at 149 (1999). In fact, in 2001, the conference managers said they were "extremely frustrated that the issue of the long term solvency of the Combined Benefit Fund has

not been addressed by the Committees of jurisdiction." H.R. Rep. 106-914 at 200 (2000). If anything, this statement indicates that the current Coal Act is not in a form that would have passed.

III. THE COURT OF APPEALS REWROTE THE COAL ACT IN AN ATTEMPT TO SAVE IT

The court of appeals held that the Commissioner properly reassigned the *Eastern* beneficiaries to petitioners, even though petitioners are not "the signatory operator which employed the coal industry retiree . . . for a longer period of time than any other signatory operator." 26 U.S.C. § 9706(a)(3). The court reached this conclusion on the basis that the result in *Eastern Enterprises* is a "case unprovided for," thereby allowing the Commissioner to engage in "gap-filling." (App. 31a.) Again, with respect, petitioners submit that while there may be a gap in funding, there is no gap in the statute directing how assignments should be made. The assignments go to Eastern Enterprises and companies like it. The fact that these assignments cannot be made that way under the Constitution does not mean that they are not supposed to be made that way under the statute. The Commissioner has no authority to amend the statute to change the way assignments are made. That is Congress's responsibility.

In *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 171-72 (2003), the Court held that the Commissioner was authorized to make assignments after October 1, 1993, the date specified for assignments in 26 U.S.C. § 9706(a). Because the Act's purpose is to identify and assign beneficiaries to the persons "most responsible," the Court held that the October 1, 1993, date was not intended as a bar to tardy assignments.

In the present case, however, we are not dealing with merely a missed deadline for making assignments, but with assignments that have been made contrary to the prescribed statutory order. As in *Sigmon*, this is a case in which the

Court must decline the Commissioner's invitation to rewrite an unambiguous statute. 534 U.S. at 449, 462; *see Davis v. Wallace*, 257 U.S. 478, 484 (1922) (noting that "[t]o refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing").

In rewriting the Coal Act, the Commissioner has made a harsh law even harsher. The reassignments are going not to the operator which employed the retiree "for a longer period of time than any other signatory operator," but to companies which may have employed the retiree for only a few months, a few days, or even a few hours. For example, petitioners have received *Eastern* reassignments for individuals who last worked for petitioners over 50 years ago and whose total earnings from petitioners were as little as $584.33 in one case, and as little as $329.55, $277.29, $50.59, and $1.73 in five others. These reassigned individuals worked their careers with other employers, but, under the court of appeals' decision, petitioners are now the operators "most responsible" for their lifetime health care and that of their dependents.

The text of the Coal Act aside, 26 U.S.C. § 7852(a) prohibits the result in this case. That statute guarantees that the application of the Coal Act to petitioners "shall not be affected" by invalidation of the Act in other applications. The statute protects petitioners from the Eastern reassignments and from additional death benefit premiums and unassigned beneficiaries premiums. Petitioners cannot be made to pay more because others are now paying less.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 28, 2004

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APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-2199

THE PITTSTON COMPANY; BUFFALO MINING COMPANY; CLINCHFIELD COAL COMPANY; EASTERN COAL CORPORATION; ELKAY MINING COMPANY; JEWELL RIDGE COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; MEADOW RIVER COAL COMPANY; PITTSTON COAL GROUP; RANGER FUEL CORPORATION,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant & Third Party Plaintiff-Appellee,

v.

MICHAEL H. HOLLAND, Trustee of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN; ELLIOT A. SEGAL, Trustee of the United Mine Workers of America Combined Benefit Fund; WILLIAM P. HOBGOOD, Trustee of the United Mine Workers of America Combined Benefit Fund; MARTY D. HUDSON, Trustee of the United Mine Workers of America Combined Benefit Fund; THOMAS O. S. RAND, Trustee of the United Mine Workers of America Combined Benefit Fund; GAIL R. WILENSKY, Trustee of the United Mine Workers of America Combined Benefit Fund; CARL E. VAN HORN, Trustee of the United Mine Workers of America Combined Benefit Fund; CARLTON R. SICKLES, Trustee of the United Mine Workers of America Combined Benefit Fund,

Third Party Defendants-Appellees,

THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INCORPORATED,

Intervenor,

and

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

Party in Interest.

No. 02-2200

THE PITTSTON COMPANY; BUFFALO MINING COMPANY; CLINCHFIELD COAL COMPANY; EASTERN COAL CORPORATION; ELKAY MINING COMPANY; JEWELL RIDGE COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; MEADOW RIVER COAL COMPANY; PITTSTON COAL GROUP; RANGER FUEL CORPORATION,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant & Third Party Plaintiff-Appellee,

v.

MICHAEL H. HOLLAND, Trustee of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN; ELLIOT A. SEGAL, Trustee of the United Mine Workers of America Combined Benefit Fund; WILLIAM P. HOBGOOD, Trustee of the United Mine Workers of America Combined Benefit Fund; MARTY D. HUDSON, Trustee of the United Mine Workers of America Combined Benefit Fund; THOMAS O. S. RAND, Trustee of the United Mine Workers of America Combined Benefit Fund; GAIL R. WILENSKY, Trustee of the United Mine Workers of America Combined Benefit Fund; CARL E. VAN HORN, Trustee of the United Mine

Workers of America Combined Benefit Fund; CARLTON R. SICKLES, Trustee of the United Mine Workers of America Combined Benefit Fund,

Third Party Defendants-Appellees,

THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INCORPORATED,

Intervenor,

and

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

Party in Interest.

No. 03-1351

THE PITTSTON COMPANY; BUFFALO MINING COMPANY; CLINCHFIELD COAL COMPANY; EASTERN COAL CORPORATION; ELKAY MINING COMPANY; JEWELL RIDGE COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; MEADOW RIVER COAL COMPANY; PITTSTON COAL GROUP; RANGER FUEL CORPORATION,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant & Third Party Plaintiff-Appellee,

v.

MICHAEL H. HOLLAND, Trustee of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN; ELLIOT A. SEGAL, Trustee of the United Mine Workers of America Combined Benefit Fund; WILLIAM P. HOBGOOD, Trustee of the United Mine Workers of America Combined Benefit Fund; MARTY D. HUDSON, Trustee of the United Mine Workers of America Combined Benefit Fund; THOMAS O.

S. RAND, Trustee of the United Mine Workers of America Combined Benefit Fund; GAIL R. WILENSKY, Trustee of the United Mine Workers of America Combined Benefit Fund; CARL E. VAN HORN, Trustee of the United Mine Workers of America Combined Benefit Fund; CARLTON R. SICKLES, Trustee of the United Mine Workers of America Combined Benefit Fund,

Third Party Defendants-Appellees,

and

THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INCORPORATED; INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

Parties in Interest.

No. 03-1354

THE PITTSTON COMPANY; BUFFALO MINING COMPANY; CLINCHFIELD COAL COMPANY; EASTERN COAL CORPORATION; ELKAY MINING COMPANY; JEWELL RIDGE COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; MEADOW RIVER COAL COMPANY; PITTSTON COAL GROUP; RANGER FUEL CORPORATION,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant & Third Party Plaintiff-Appellee,

MICHAEL H. HOLLAND, Trustee of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN; ELLIOT A. SEGAL, Trustee of the United Mine Workers of America Combined Benefit Fund; WILLIAM P. HOBGOOD, Trustee of the United Mine Workers of America Combined Benefit Fund; MARTY D. HUDSON, Trustee of the United Mine Workers of America Combined Benefit Fund; THOMAS O.

S. RAND, Trustee of the United Mine Workers of America Combined Benefit Fund; GAIL R. WILENSKY, Trustee of the United Mine Workers of America Combined Benefit Fund; CARL E. VAN HORN, Trustee of the United Mine Workers of America Combined Benefit Fund; CARLTON R. SICKLES, Trustee of the United Mine Workers of America Combined Benefit Fund,

Third Party Defendants-Appellees,

and

THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INCORPORATED; INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,

Parties in Interest.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-97-294-3; CA-01-273-3)
Argued: January 21, 2004;Decided: May 18, 2004

Before WILKINS, *Chief Judge*, and NIEMEYER and TRAXLER, *Circuit Judges*.

OPINION

NIEMEYER, *Circuit Judge*:

These appeals challenge the constitutionality of the Coal Industry Retiree Health Benefits Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701-9722.

In response to severe financial difficulties that were undermining the National Bituminous Coal Wage Agreements ("NBCWAs")—collective bargaining agreements between the Bituminous Coal Operators' Association and the United Mine Workers of America, promising healthcare

benefits to active and retired coal miners—Congress enacted the Coal Act to preserve benefits promised by the NBCWAs to retired coal miners. The Coal Act requires coal operators who had signed NBCWAs over the years to pay premiums into a trust fund in an amount related to the number of retired coal miners they have employed, thereby creating a common trust fund from which the promised healthcare benefits can be paid.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Supreme Court held that the Coal Act was unconstitutional insofar as it imposed severe retroactive liability on a coal company that had not signed a labor agreement since 1964.

In challenging the constitutionality of the Coal Act and its application following the decision in *Eastern Enterprises,* the Pittston Company contends in this case: (1) that the Coal Act unconstitutionally violates nondelegation and separation of powers principles by placing governmental powers in the hands of the trustees of the common trust fund, a private entity created by the Coal Act; (2) that the Coal Act is nonseverable and therefore the decision in *Eastern Enterprises* invalidating application of the Coal Act to certain coal operators invalidates it as to all coal operators; and (3) the Social Security Commissioner's reassignment of beneficiaries to the Pittston Company after the decision in *Eastern Enterprises* was accomplished through an impermissible interpretation of the Coal Act's language, resulting in larger premiums for the Pittston Company. The Pittston Company has also raised two administrative issues: it has urged that this court hold in abeyance review of the district court's ruling that the Coal Act does not violate the Due Process Clause or the Takings Clause of the Fifth Amendment, pending Supreme Court review of our decision in *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226 (4th Cir. 2002); and it has assigned as an abuse of discretion the district court's refusal to unseal confidential documents produced to the Pittston

Company by the Bituminous Coal Operators' Association and made part of the record in this case.

The district court rejected Pittston's substantive arguments and denied its motion to unseal the confidential documents. For the reasons that follow, we deny as moot the motion to hold the Fifth Amendment issue in abeyance, and we affirm on the remaining issues.

I

The Coal Act's enactment in 1992 was the culmination of a long history involving bituminous coal companies (represented by the Bituminous Coal Operators' Association ("BCOA")), the United Mine Workers of America ("UMWA"), and collective bargaining agreements between them, beginning with the NBCWA signed in 1947. The Supreme Court has detailed this history in *Eastern Enterprises,* 524 U.S. at 504-15, and we draw on that history here only briefly to provide context to the issues presented on appeal.

A

The NBCWA negotiated in 1947 between the BCOA and the UMWA provided pension and medical benefits to coal miners and their families through a trust fund created by the 1947 NBCWA. This trust fund became a multiemployer trust fund in the 1950 NBCWA, funded by coal operators with royalties paid in proportion to the operators' coal production.

Upon enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), which imposed specific funding and vesting requirements on the NBCWAs and other similar agreements, the UMWA and the BCOA entered into the 1974 NBCWA, which replaced the trust fund in the 1950 NBCWA with four separate trusts, again funded by royalties on coal production and premiums based on employee hours. The 1974 NBCWA was, as the Supreme Court noted in

Eastern Enterprises, "the first agreement between the UMWA and the BCOA to expressly reference health benefits for retirees." 524 U.S. at 509.

The trust funds created by the 1974 NBCWA soon began to experience financial difficulties, and to address them, the 1978 NBCWA assigned responsibility to signatory coal operators for the healthcare of all of their own current and former employees. In addition, under the 1978 NBCWA, the coal operators for the first time became responsible for funding specific benefits for employees, rather than simply paying a predetermined amount of royalties to a trust fund based on coal production. Nonetheless, the trust funds continued to experience financial difficulties, and more and more coal operators abandoned the NBCWAs, choosing to hire only nonunion employees or electing to leave the coal business altogether. Those developments left remaining NBCWA signatories with yet heavier financial obligations, which in turn prompted still more coal operators to leave. In this downward spiral, the incentive to abandon the NBCWAs became greater as fewer companies were left to bear the burdens, and with the 1988 NBCWA, the UMWA and the BCOA began imposing withdrawal liability on NBCWA signatories. Despite this measure, the trust funds had, by 1990, run up a deficit of about $110 million. A Senate subcommittee conducting hearings on the Coal Act was advised in 1991 that more than 120,000 coal miner retirees had become at risk of not receiving "the benefits they were promised." *Eastern Enterprises*, 524 U.S. at 513.

B

In 1992, Congress enacted the Coal Act to identify the coal operators most responsible for benefit plan liabilities and to enlist them to provide benefits to retirees under a new comprehensive plan. The Coal Act merged the earlier trust funds of the NBCWAs into a new multiemployer trust fund called the United Mine Workers of America Combined

Benefit Fund ("Combined Fund"). 26 U.S.C. § 9702. This new Combined Fund was constituted to provide "substantially the same" health benefits to retirees and their dependents that they were receiving under the 1950 and 1974 NBCWAs as of January 1, 1992. *Id.* §§ 9703(b)(1), (f). To continue financing the Combined Fund, the Coal Act assessed annual premiums against "signatory operators"—coal operators that had signed any agreement requiring contributions to the earlier trust funds, *id.* §§ 9701(b)(1), (b)(3), (c)(1), and who remained "in business" (defined by the statute as any person who "conducts or derives revenue from any business activity, whether or not in the coal industry"), *id.* § 9706(a); *id.* § 9701(c)(7). If a signatory coal operator was no longer in business, liability for payment of the premium passed to any "related person." *Id.* § 9706(a); *id.* § 9701(c)(2)(A).

The premiums assessed against each signatory operator depended on the number of beneficiaries assigned to it, and the assignment of beneficiaries to each signatory operator was made on the basis of the Coal Act's determination of the operator most responsible for the beneficiaries' benefits. The Coal Act required that the Social Security Commissioner assign all beneficiaries to signatory operators according to a three-tiered statutory scheme. *Id.* § 9706(a). That scheme provided that coal miner retirees be assigned first to the operator who signed the 1978 NBCWA or later agreement and who was the most recent operator to have employed the retiree *for at least two years. Id.* § 9706(a)(1). If no operator fit that description for a given retiree, the retiree was assigned to the operator who signed the 1978 NBCWA or later agreement and was the most recent signatory operator to have employed the retiree, *regardless of the length of employment. Id.* § 9706(a)(2). And if no operator fit that description, the retiree was assigned to the signatory operator who employed the retiree for the longest period of time. *Id.* § 9706(a)(3). The statute provided benefits for "unassigned" beneficiaries under a separate system. *Id.* § 9704(d).

To administer the Combined Fund, the Coal Act assigned responsibilities to the Secretary of the Treasury, the Commissioner of Social Security, and the Board of Trustees of the Combined Fund. The Commissioner was given the responsibility of assigning the beneficiaries to signatory operators according to the scheme established in § 9706(a) and of calculating the premium that each operator was to be assessed under the formulation provided in the statute. *Id.* §§ 9704, 9706. If a signatory operator were to fail to pay the premiums assessed, the Trustees of the Combined Fund could report that fact to the Secretary of Treasury, who was given the responsibility of determining whether there was reasonable cause for the failure to pay. *Id.* § 9707. The Board of Trustees of the Combined Fund was given the responsibility of administering the Fund, by collecting the premiums, *id.* § 9704(a); enrolling beneficiaries in health plans that fulfilled the statute's requirements, *id.* § 9703 (b)(1); negotiating with health plans for payment rates, *id.* § 9703(b)(2); and suing signatory operators for nonpayment, *id.* § 9721; 29 U.S.C. § 1451.

Congress designated the Combined Fund a "plan" under both the Labor Management Relations Act and ERISA. 26 U.S.C. § 9702(a)(3).

C

The Pittston Company is a coal operator that was a signatory to the 1974 NBCWA, but to no subsequent agreements. The company does, however, have nine subsidiaries,[1] which are "related parties" under the Coal Act. At least one of the Pittston Company's subsidiaries signed a NBCWA after 1974. As a signatory operator, Pittston is

[1] The subsidiaries are Buffalo Mining Company, Clinchfield Coal Company, Eastern Coal Corporation, Elkay Mining Company, Jewell Ridge Coal Corporation, Kentland-Elkhorn Coal Corporation, Meadow River Coal Company, Pittston Coal Group, Inc., and Ranger Fuel Corporation.

responsible under the Coal Act for providing the healthcare benefits for active and retired coal miners.

Following the Supreme Court's decision in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), which invalidated the application of the Coal Act to plaintiff Eastern because Eastern had quit the coal business and had not signed a wage agreement since 1964, the Social Security Commissioner reevaluated its assignments under 26 U.S.C. § 9706(a). The Commissioner determined that, in light of *Eastern Enterprises,* coal operators that had not signed the 1974 NBCWA or a later agreement were not to be assigned beneficiaries under the third prong of § 9706(a). Instead, each beneficiary would be assigned to a coal operator that had signed the 1974 NBCWA or a later agreement and that had employed the beneficiary for the longest amount of time. As a result of this reevaluation and interpretation of the Coal Act, the Commissioner reassigned to the Pittston Company 95 beneficiaries whose earlier assignments had been invalidated.

The Pittston Company and its subsidiaries (collectively, "Pittston") commenced this action in 1997, before the decision in *Eastern Enterprises,* alleging (1) that the Coal Act was unconstitutional as violating the nondelegation doctrine, and (2) that the United States had over-charged Pittston under the Coal Act in its assessments made over a period of three years. While the case was pending, the Supreme Court decided *Eastern Enterprises* and invalidated the application of the Coal Act to Eastern because the assignments of beneficiaries to Eastern created a severe retroactive liability that violated the Fifth Amendment. Pittston accordingly filed a motion for leave to amend its complaint to add a Fifth Amendment claim and also to claim that the Coal Act was not severable and therefore invalid as to Pittston under the ruling of *Eastern Enterprises.* The district court denied Pittston's motion to amend and also dismissed Pittston's pending

constitutional claims as barred by the doctrine of *res judicata*. The district court, however, granted judgment for Pittston on the overpayment claim, a claim that the parties settled after the United States noticed an appeal.

On Pittston's appeal, we concluded that Pittston's claims were not barred by *res judicata* and that the district court improperly denied Pittston leave to amend its complaint. *Pittston Co. v. United States*, 199 F.3d 694, 706 (4th Cir. 1999).

On remand, Pittston filed an amended complaint adding claims that the Coal Act is nonseverable and that it violates the Fifth Amendment as applied to Pittston, based on *Eastern Enterprises*. On motions for summary judgment, the district court resolved all substantive claims against Pittston.

These appeals followed.

II

Pittston contends first that the Coal Act unconstitutionally delegates governmental authority to the Combined Fund, a private entity, giving the Combined Fund "discretionary authority to collect and spend federal taxes and the plenary authority to administer a federal entitlement." It asserts that under the constitutional structure, "[t]he President—not Congress, not the Judiciary, and certainly not a private party—is the person vested with executive power and charged with the right and duty faithfully to execute the nation's laws." In particular, Pittston argues that the Combined Fund is "unique" in that there is no entity under federal or state law like it because it is a private entity given the power "to collect, manage, and spend federal revenues." Pittston then lists some 21 powers given to the Combined Fund that it maintains involve an unconstitutional delegation, concluding at bottom that the Coal Act authorizes a "'delegation in its most obnoxious form'" (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

The United States and the Trustees of the Combined Fund contend that the Coal Act specifies "in detail" how coal operators are identified for responsibility under the Coal Act; how assignments of retired coal miners to operators are made; how coal miners are identified; and the type of benefits each is to receive. They assert that the Act lawfully delegates to the Commissioner of Social Security the responsibility for calculating premiums assessed against coal operators, for making assignment of retirees to coal companies, for hearing challenges to the assignments, and for reviewing and revising them. They conclude: "The Act permits the Combined Fund and the Trustees to exercise only limited responsibilities on a strictly circumscribed basis, and all of those responsibilities are ones that are traditionally exercised by private parties."

It is a fundamental principle of jurisprudence that an agent has no authority to delegate his power to represent the principal except as authorized or as necessary and proper for the agent to perform his duties. Thus, when the Constitution vests "all legislative Powers" in a Congress of the United States, "the executive Power" in a President of the United States, and "the judicial Power" in one Supreme Court and such courts as Congress may establish, *see* U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1, a nondelegation principle serves both to separate powers as specified in the Constitution, *see, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001), and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design, *see Carter*, 298 U.S. at 311. Moreover, because the Constitution's text "permits no delegation of those powers," *see Whitman*, 531 U.S. at 472, in exercising conferred powers, a Department may authorize a person or body to act on its behalf only by designating "'an intelligible principle to which the person or body authorized to act is directed to conform.'" *Id.* (quoting J .W. *Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1938)). In other words, core governmental power must be exercised by the Depart-

ment on which it is conferred and must not be delegated to others in a manner that frustrates the constitutional design.

Because the Combined Fund in this case is *a private* entity, rather than a part of the executive branch of government, improper delegation of power to it would represent "legislative delegation in its most obnoxious form." *Carter*, 298 U.S. at 311. Any delegation of regulatory authority "to private persons whose interests may be and often are adverse to the interests of others in the same business" is disfavored. *Id.* In *Carter*, the Supreme Court invalidated the Bituminous Coal Conservation Act, which provided that *all* coal producers had to accept the maximum labor hours and minimum wages negotiated by majority producers of coal and representatives of more than half of the mine workers. The Court found that the law improperly delegated governmental power to the majority, enabling it to "regulate the affairs of an unwilling minority" and thus allowing controlling producers to pursue their interests unfairly. *Id.*

Not every Congressional delegation of authority to a private party is impermissible, however. In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), the Supreme Court upheld a statute that allowed a private party, made up of coal producers, to propose minimum coal prices to the National Bituminous Coal Commission, a public agency, which could then approve, disapprove, or modify the proposal. The Court found that because "members of the [private entity] function[ed] subordinately to the Commission," which had "authority and surveillance" over the private entity, the delegation was not unlawful. *Id.* at 399.

The Third Circuit applied *Sunshine Anthracite* to uphold the Beef Promotion Act, which created the Cattlemen's Board, a private entity, to collect from cattle producers an assessment of one dollar per head. *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). Under the Beef Promotion Act, the Cattlemen's

Board was authorized to use the money collected to develop a beef-promotion plan, which was then subject to the approval of the Secretary of Agriculture. The Third Circuit found that because the private entity served "an advisory function, and in the case of collection of assessments, a ministerial one," the Act did not improperly delegate governmental power to a private entity. *Id.* at 1129. Thus, in applying the holding of *Sunshine Anthracite* and *Carter*, the Third Circuit articulated the standard that Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others. We agree that this articulation accurately summarizes the Supreme Court's holdings, and it is this standard that we now apply in assessing the provisions of the Coal Act to determine whether it improperly delegates core governmental power to the Combined Fund.

The Coal Act creates the Combined Fund to provide benefits to retired coal miners. 26 U.S.C. § 9702. The Act finances those benefits by annual assessments on "signatory operators," defined by the Coal Act to be any coal operator that has signed an agreement with the UMWA requiring the coal operator to pay for health and death benefits for retired miners. *Id.* § 9701(b)(1), (c)(1); *id.* § 9706(a). The Coal Act provides that any signatory coal operator still in business, whether or not in the coal business, remains liable for payment of premiums. *Id.* § 9701(c)(7); *id.* § 9706(a). And the Act sets out specific formulas for calculating the premiums to be paid by each signatory operator. *Id.* § 9704. It provides that the health benefit premium must be the "product of the per beneficiary premium for [each] plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706." *Id.* § 9704(b)(1). And the Act assigns to the Social Security Commissioner the task of performing the specific calculations. *Id.* § 9704(b)(2). Thus, the Combined Fund has no power to determine the premium payments owed by each coal operator to the Combined Fund.

Under this calculation of the health benefit premium, of course, the "number of eligible beneficiaries" assigned to a signatory operator ultimately fixes the amount that an operator must pay. The Social Security Commissioner, rather than the Combined Fund, is given the responsibility of assigning beneficiaries to the coal operators that will pay their benefits, according to a three-tiered preference structure explicitly set forth in the Act. *Id.* § 9706(a). The Commissioner is also given the responsibility of notifying each coal operator of its assignment of responsibility for each retired miner, *id.* § 9706(e)(2), and an assignee may seek administrative review of the Commissioner's decision if it believes that the assignment was in error, *id.* § 9706(f).

Finally, the Coal Act defines the scope of benefits that the Combined Fund must provide to beneficiaries, stating that they must be "substantially the same as (and subject to the same limitations of) coverage provided under the 1950 [NBCWA] and the 1974 [NBCWA] as of January 1, 1992." *Id.* § 9703(b)(1). A similar requirement is imposed on the death benefits provided by the Plan. *See* § 9703(c).

Against these detailed requirements of the Coal Act, the Trustees of the Combined Fund are assigned the task of collecting the premiums *designated* by the statute from the persons *specified* by statute. The Trustees are directed to preserve the assets through investment and to pay them out as benefits to the beneficiaries in an amount *specified* by the statute. *Id.* § 9703(a)-(c). If a coal operator fails to pay the premium required by the Coal Act, it becomes liable to a $100 per-day penalty, and the Secretary of Treasury, not the Combined Fund, determines whether the penalty may be excused. *Id.* § 9707.

In short, the Coal Act or the Social Security Commissioner defines the nature of the Combined Fund and who must contribute to it; specifies the amount of each premium payable by a coal operator to the Combined Fund; specifies

with particularity each beneficiary who is entitled to receive benefits from the Combined Fund; and designates the nature and amount of the benefits. With those functions specifically defined and mandated by Congress, the Coal Act confers responsibility to the Trustees of the Combined Fund to implement the collection of the premiums, the preservation of premiums collected, and the payment of the premiums to specified beneficiaries in an amount stated by the Act. These powers given to the Trustees are of an administrative or advisory nature, and delegation of them to the Trustees does not, we conclude, violate the nondelegation doctrine.

Despite the reservation to Congress or the Commissioner of the core governmental powers with respect to the Combined Fund, Pittston has generated a 21-item list of powers that it claims were unconstitutionally delegated to the Combined Fund under the Coal Act.[2]

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[2] Pittston characterizes the 21 powers of the Combined Fund as follows:

(1) It has the power to create its own charter—the trust document.

(2) It has the power to amend its charter at any time.

(3) It has the power to receive transfers of federal revenues directly from the United States Abandoned Mine Reclamation Fund.

(4) It has the power to collect taxes from assigned operators.

(5) It has the power to invest the money it receives, including placing the money with foreign banks and governments.

(6) If a taxpayer does not pay voluntarily, it has the authority to refer the taxpayer to the Treasury Department for imposition of a $100 per day per beneficiary penalty.

(7) It has the power to sue the taxpayer for the taxes owed.

(8) It has the power to compromise with the taxpayer on the principal amount owed, as well as interest, costs, and attorney's fees.

(9) It has the power not to sue a delinquent taxpayer if it so chooses.

The vast majority of these items clearly do not violate the nondelegation doctrine. *First*, several of them relate to the Combined Fund's internal governance, which in no way impinges upon others. These include creating and amending its own charter, employing staff and outside counsel, and enacting rules and regulations governing its operations. *Second*, several relate to the power to sue for monies owed to itself, which is not a governmental power, but a private one. *Third*, the mere ability to receive governmental monies is clearly ministerial, so that the power to receive taxes (premiums) and other federal revenues (which private employers do with every paycheck) does not violate the nondelegation

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(10) It decides whether taxpayers are still "in business" and thus subject to the Coal Act.

(11) It has the power to determine and sue "related persons" of the taxpayer.

(12) It has the power to "pierce the veil" of corporations and sue individuals.

(13) It has the power to employ staff under such terms as it chooses.

(14) It has the power to employ outside counsel.

(15) It has the power to contest in court the amount of the per beneficiary premium calculated by the Commissioner (and has done so).

(16) It has the power to enact rules and regulations governing its operations.

(17) It has the power to decide issues of eligibility under the definitions of the Coal Act.

(18) It has (or at least claims) the power to interpret the "intent of Congress" in enacting the Coal Act.

(19) It has (or at least claims) the power to decide whether to issue refunds or credits to taxpayers for overpayments.

(20) It has the power to calculate and assess death benefit premiums and unassigned beneficiary premiums.

(21) It has the power to do all other acts that, in its opinion, are necessary to carry out the business of the Combined Fund.

doctrine. *Fourth*, the Fund's authority to refer delinquent operators to the Treasury Department for a penalty is just an "advisory" role, subject to the Secretary of Treasury's supervisory authority, similar to that specifically authorized in *Sunshine Anthracite* as a valid delegation to a private entity. *Fifth*, the Combined Fund's power to "calculate and assess" some premiums is inconsequential, given that the Coal Act gives detailed guidance as to what those premiums must be and by whom they must be paid. The Fund in these capacities is merely carrying out the ministerial task of doing calculations and collecting funds.

Several of Pittston's other allegations are too vague even to constitute a power on the part of the Combined Fund. Its claims that the Combined Fund has the power "to decide issues of eligibility under the definitions of the Coal Act" and "to interpret the `intent of Congress' in enacting the Coal Act" do not alone allege impermissible delegation. Anyone can interpret the intent of Congress, of course. The question is in what context the Combined Fund's interpretations might have weight, and how much. The Coal Act does not grant the Combined Fund any authority in interpreting its provisions. Similarly, Pittston fails to explain what "issues of eligibility" the Combined Fund has power to decide. Again, the Coal Act does not appear to leave any issues of eligibility to the Combined Fund. Pittston's claim that the Fund has the power to "decide whether to issue refunds or credits to taxpayers for overpayments" is an erroneous characterization. Indeed, in this very litigation, Pittston sued the Combined Fund and received a judgment for its overpayment of Coal Act premiums as determined *by the provisions of the Coal Act.*

Pittston also challenges the Combined Fund's power to invest the premiums it receives from the coal operators. The function of investing money, however, is not essentially governmental in nature. The Combined Fund's activities in this regard are no different from those of many pension funds

after the enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461. The MPPAA was enacted to supplement ERISA and to establish the Pension Benefit Guaranty Corporation to administer an insurance program for vested benefits. Under the MPPAA, private pension funds receive withdrawal penalties that are assessed according to statute, and these private pension funds use the withdrawal-penalty payments to make investments and to pay pension fund beneficiaries. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 723-25 (1984). While the Supreme Court has not decided explicitly that the MPPAA is permissible under the nondelegation doctrine, it has upheld the constitutionality of the Act against challenges under the Takings Clause and the Due Process Clause. *See id.* at 734; *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227-28 (1986). Pittston argues that the Combined Fund's activities are different from those of private pension funds under the MPPAA because the monies used by the Combined Fund have been defined as taxes. *See Pittston Co. v. United States*, 199 F.3d 694, 702 (4th Cir. 1999). Regardless of how the monies are labeled, however, both the monies received by the pension funds under the MPPAA and the monies received by the Combined Fund under the Coal Act are assessed by statute. More to the point, the central inquiry is whether the *function* of the Combined Fund in preserving and investing money assessed by statute is governmental in nature. The label placed on the monies received by the Fund does not change the Fund's function. Moreover, the act of investing the money received under the Coal Act does not impinge upon the interests of other citizens in a way feared by the Supreme Court in *Carter*.

At its core, the Coal Act identifies each coal operator responsible for the payment of premiums and each coal miner who is to receive a benefit from the premiums. The Act

determines the nature of the retiree's benefit and its amount, and the Social Security Commissioner, not the Combined Fund, computes the amount of the premium payable by a coal company for this purpose, based on the number of retirees assigned to the coal operator and the benefits payable to them. In this scheme, the Coal Act, in essence, leaves to the private entity only the administrative tasks of collecting the premiums, preserving them for the benefit of the beneficiaries, and using them to provide the beneficiaries with the benefits specified by the Coal Act.

Even with respect to the ministerial and advisory functions delegated to the Combined Fund, the Coal Act imposes restrictions by designating the Fund as a "plan" under the Labor Management Relations Act and the Employee Retirement Income Security Act ("ERISA"). *See* 26 U.S.C. § 9702(a)(3). Among other requirements, ERISA provides that an ERISA plan's trustees must act "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan . . . ." 29 U.S.C. § 1104(a)(1). As characterized by the Supreme Court, ERISA imposes "'strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets.'" *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985) (quoting 120 Cong. Rec. 29, 932 (1974)). Their failure to discharge their specified duties properly subjects them to the threat of personal lawsuits for breach of fiduciary duty. The Combined Fund Trustees are thus subject to many restrictions ensuring that even in discharging administrative and advisory powers, they not act according to their own whims or prejudices, but *solely* in the best interest of the Combined Fund's beneficiaries.

In sum, the Trustees' powers with respect to the Combined Fund are far from unfettered. The Trustees are not able to use their position for their own advantage—to the disadvantage of their fellow citizens—as was permitted by the Bituminous Coal Conservation Act struck down in *Carter*. They are given ministerial and advisory tasks in a manner and to an extent that does not violate the nondelegation doctrine.

III

Pittston next contends that the Supreme Court's decision in *Eastern Enterprises*, 524 U.S. 498, invalidating the Coal Act's application to a group of coal operators, had the effect of invalidating the entire Coal Act, because the decision so altered the Act that to continue to enforce it would contradict congressional intent. Pittston argues that to make up for the shortfall effected by the holding in *Eastern Enterprises* and its elimination of a group of coal operators as contributors to the Combined Fund, the Trustees assigned retired coal miners to Pittston and others, requiring them "to pay more because others are paying less." Pittston notes that the Coal Act was a "bipartisan compromise," the "key feature [of which] was the imposition of liability on *all* former signatories to NBCWAs." For these reasons, Pittston argues that no part of the Coal Act is severable from the parts deemed unconstitutional, and therefore the entire Act is unenforceable.

The Coal Act directs the Commissioner of Social Security to assign to each coal operator the duty of paying premiums to fund the benefits of each retired coal miner whom it employed and for whom it had the most responsibility. The assignments are made in accordance with a detailed, three-tiered system designed to match up beneficiaries with the coal operators deemed most responsible for providing the retirees' benefits. Thus, a retiree is assigned first to any operator who signed the 1978 NBCWA and who was the most recent operator to employ the retired miner for at least two years. 26 U.S.C. § 9706(a)(1). If no such operator exists, the retiree is

assigned to a coal operator who signed the 1978 NBCWA and who was the most recent employer of the coal miner, regardless of his length of service. *Id.* § 9706(a)(2). Finally, if no such operator exists, the Coal Act provides that the beneficiary is assigned to the operator who employed the retired coal miner the greatest length of time, regardless of which NBCWA the operator has signed. *See id.* § 9706(a)(3).

In *Eastern Enterprises*, the Supreme Court held this assignment scheme unconstitutional as it applied to the plaintiff Eastern. Eastern had conducted business as a coal operator from 1929 to 1965, and even though it was a signatory to each NBCWA between 1947 and 1964, it signed none after the 1964 NBCWA. Under the assignment scheme of the Coal Act, Eastern was assigned more than 1000 retired coal miners who had worked for the company before 1966 and who had not worked for any coal operator that had signed the 1978 NBCWA or later agreement. *See* 26 U.S.C. § 9706(a)(3). Because of those assignments, Eastern was retroactively assessed more than $5 million in premiums to pay for benefits of employees who had worked for it some 35 years earlier and for whom Eastern had never signed a NBCWA promising lifetime healthcare benefits. The plurality in *Eastern Enterprises* identified the 1974 NBCWA, one that Eastern did not sign, as the one in which lifetime benefits were first promised. *See* 524 U.S. at 509, 530, 535.

The majority of the Supreme Court found the application of the Coal Act to Eastern unconstitutional because it imposed severe retroactive liability on the company. The plurality of the Court held that the assignment of beneficiaries to Eastern worked an unconstitutional taking, reasoning that Eastern was being forced "to bear a burden that is substantial in amount, based on . . . conduct far in the past, and unrelated to any commitment that [Eastern] made or to any injury [it] caused." *Eastern Enterprises*, 524 U.S. at 537 (O'Connor, J.). Justice Kennedy, concurring in the judgment, found that the

statute's application to Eastern violated substantive due process, reasoning that because Eastern left the coal business long ago and was not a party to any agreements that contemplated lifetime benefits, "[t]his case is far outside the bounds of retroactivity permissible under our law." *Id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part).

The question Pittston thus presents is whether the Supreme Court's holding that the Coal Act was unconstitutional, as it applied to Eastern, in effect invalidated the Coal Act for all coal operators because the Act is not severable.

We begin with the background presumption that when an application of a statute is determined to be unconstitutional, courts seek to preserve as much of the statute as is still consistent with legislative intent; courts "should refrain from invalidating more of the statute than is necessary. . . . [W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks and citations omitted). The question of whether portions of an act can be severed from unconstitutional portions requires "an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). Thus, valid provisions of an act will remain enforceable unless it is "evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Alaska Airlines*, 480 U.S. at 684 (internal quotation marks and citations omitted). Of course, an explicit severability clause within a statute "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is *strong evidence* that Congress intended otherwise, the objectionable

provision can be excised from the remainder of the statute." *Id.* at 686 (citations omitted) (emphasis added).

The Coal Act is subject to a severability clause that provides, "If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." 26 U.S.C. § 7852(a). Because Congress revealed its intent to make the provisions of Title 26 severable, Pittston must present "strong evidence" that Congress would never have intended to enact the Coal Act's assignment scheme at all if it could not have included Eastern-like operators.

Pittston argues that the strong evidence of Congress' intent that the Coal Act not be severable when some coal operators—such as Eastern-like operators—are removed from the funding pool is supplied by (1) legislative history, and (2) the altered functioning of the Act without Eastern-like operators included in the pool.

In support of its legislative-history argument, Pittston points only to a statement by Senator Rockefeller that "[i]nstead of including a broad industrywide tax, the basic funding mechanism of this legislation generally requires premium payments *from those for whom the retirees worked.*" (Quoting 138 Cong. Rec. S 17,633 (daily ed. Oct. 8, 1992) (Statement of Sen. Rockefeller)) (emphasis added). This statement, however, does not suggest that it was an essential aspect of the Coal Act that *every* coal operator be an actual contributor to the Combined Fund. The most that can be drawn from it is that coal operators will be assessed premiums only for those retired coal miners they actually employed. Thus, even if we were permitted to consider this statement from the legislative history as binding, it would not advance Pittston's cause. When Eastern-like operators are excluded from operation of the Coal Act, the reassignments of remaining retired miners are made under 26 U.S.C.

§ 9706(a) only to coal operators who *actually employed the retired miners.* This is just what Senator Rockefeller said: that the functioning of the Coal Act "generally requires premium payment from those for whom the retirees worked."

More importantly, Pittston's assertion that the Coal Act's functioning was dependent on the imposition of liability "on *all* former signatories to NBCWAs" is belied by the very terms of the Act. Anticipating that not *all* coal operator signatories will be available for the assignment of retired coal miners, the Act provides procedures for when companies go out of business and no longer contribute to the Combined Fund. *See* 26 U.S.C. §§ 9706(a), 9701(c)(7), 9704(f)(2)(B). In such circumstances, the orphaned beneficiaries are supported by the remaining companies. These provisions conclusively indicate that Congress did not intend the Coal Act to cease in force simply because some operators who were initially intended to be included in the statutory scheme had dropped out.

Furthermore, after the decision was handed down in *Eastern Enterprises* and after it became clear that Eastern-like operators could not be included in the Coal Act's assignment scheme, Congress continued to make appropriations to benefit Coal Act funds. *See* Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 501, 113 stat. 1501, 1501A-214 (1999); Dept. of the Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, § 701, 114 stat. 922, 1024 (2000). These appropriations *after Eastern Enterprises* suggest that Congress would have intended that the constitutional applications of the Coal Act continue to survive after *Eastern Enterprises.* Although these appropriations were by a later Congress, they carry weight in construing the intent of Congress in enacting the Coal Act. *Cf. Loving v. United States,* 517 U.S. 748, 770 (1996).

Pittston also argues that if Eastern-like operators are not included as contributors, the Coal Act is "incapable of

functioning independently," which would be dispositive evidence that Congress would not have enacted it without the ~~inclusion~~ of these operators. *See Alaska Airlines*, 480 U.S. at 684. But Pittston's assertion that the Coal Act is "incapable of functioning independently" is belied by the fact that the Coal Act continues to function without Eastern-like operators and has so functioned since 1998, when the *Eastern Enterprises* decision was handed down. The third-tier group under the assignment scheme in § 9706(a) has merely ceased to include Eastern-like operators. Moreover, even if beneficiaries assigned to Eastern-like operators could not be assigned to any other operators in accordance with the provisions of § 9706(a), the Act contemplates providing benefits to such "unassigned" beneficiaries. 26 U.S.C. § 9704(d).

In sum, Congress intended the Coal Act to be severable by inclusion of a severability clause, and the Act remains fully functional without including Eastern-like coal operators. There is no evidence to overcome the presumption that the Coal Act should continue in force despite the Supreme Court's decision in *Eastern Enterprises.*

IV

Pittston also contends that the Social Security Commissioner improperly interpreted and applied the Coal Act in the wake of *Eastern Enterprises* when she reassigned retirees previously assigned to Eastern-like operators. In making those reassignments, the Commissioner interpreted *Eastern Enterprises* to invalidate any assignments made under 26 U.S.C. § 9706(a)(3) to coal operators that never signed the 1974 NBCWA or later agreements. According to Pittston, the number of assignments so invalidated was in the thousands. The Commissioner then reassigned these retirees to the coal operator that had signed the 1974 NBCWA or a later agreement and that employed the retiree for the longest amount of time. As a result of this reassignment, Pittston, as a signatory to the 1974 NBCWA or (through related com-

panies) to a later agreement, received 95 more beneficiaries than it had prior to the Supreme Court's decision in *Eastern Enterprises*. Pittston contends that the Commissioner's construction of the Coal Act to make these reassignments violated the explicit provisions of § 9706(a) (establishing the priority scheme for assigning retirees to coal operators) and § 7852(a) (the severability clause for Title 26 of the United States Code).

It is true that Congress did not state explicitly in the Coal Act what the Commissioner should do if assignments to specific coal operators were deemed unconstitutional. But without specific instructions, in light of *Eastern Enterprises*, the Commissioner removed Eastern-like coal companies from the pool of qualified signatory operators and reassigned their beneficiaries to other companies, applying the provisions of § 9706(a) to this smaller pool of operators. Because Congress provided no explicit instructions, the question presented is whether the Commissioner's reassignments under § 9706(a) are "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The provision of the Coal Act on which the Commissioner based her construction, § 9706(a), provides the method of assigning retirees to signatory coal operators:

> For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:
>
> (1) First, to the signatory operator which—
>
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(a).

With respect to its argument that the Commissioner misconstrued and misapplied § 9706(a), Pittston asserts that the 95 retirees reassigned to it were properly assigned in the first place to Eastern-like coal operators under the terms of § 9706(a), and because they were properly assigned to other coal operators, they could not later be properly assigned to Pittston. Pittston explains:

> The fact that the assignments [made to Eastern-like coal operators] proved to be unconstitutional does not mean that they were not made as the statute requires. In *Eastern*, the Supreme Court held that the assignments required by the statute were unconstitutional, not that the assignments were contrary to the statute. The Government and Trustees want to revise the statutory order and make the remaining operators like Pittston pay for people who should be—and were—assigned to other operators.

In short, Pittston argues that the Commissioner had no authority to take beneficiaries away from Eastern-like companies and reassign them to Pittston as the "next-in-line" coal operator.

Pittston is wrong, however, in asserting that the assignments originally made to Eastern-like companies were proper—that beneficiaries ever "should" have been assigned to Eastern and to other Eastern-like signatories. In so arguing, Pittston misconstrues the nature and effect of *Eastern Enterprises.* When *Eastern Enterprises* held that it was unconstitutional to assign retirees to Eastern under the Coal Act, the ruling effectively held that the Commissioner *should never have assigned* retirees to Eastern *in the first place.* Because the Commissioner's assignments were invalid from the beginning, she had to start over to assign the beneficiaries to comport with the terms of the statute as well as the Constitution. Thus, contrary to Pittston's suggestion that the Commissioner merely reassigned retirees to the "next-in-line" operator, after *Eastern Enterprises* the Commissioner in fact interpreted "signatory operators," as used in the Coal Act and in light of the requirements of the Constitution, to include *only* operators that had signed a 1974 NBCWA or later agreement. She then assigned each retiree whose assignment was declared invalid to the signatory operator that had employed the retiree the *longest*—exactly as she was instructed to do by § 9706(a)(3) of the Coal Act. Had the Commissioner merely moved these retirees to the "next-in-line" operator, as Pittston supposes, the Commissioner would occasionally have ended up with yet another Eastern-like operator, and moreover would have acted inconsistently with her statutory responsibility to identify the signatory operator that employed the beneficiary the longest.

When a retiree cannot be assigned under § 9706(a)(1) or § 9706(a)(2), the Coal Act sometimes directs the Commissioner to do something unconstitutional: i.e., assign the retiree

to an Eastern-like coal operator. In drafting the Coal Act, Congress did not contemplate that some members of the "signatory operators" group could not constitutionally be required to contribute to the Combined Fund. The situation faced by the Commissioner was thus the kind of "case unprovided for" that allows her to engage in gap-filling.[3] *See*

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[3] The dissent argues that this was *not a* "case unprovided for," in the sense that the statute provides for "unassigned" beneficiaries. It argues:

> In the case of each of the 95 retirees at issue here, the plain language of § 9706(a) at the time the original assignments were made identified a single company—an Eastern-type company. However, because assignments to these companies were unconstitutional, the Commissioner could not lawfully perform the only act authorized by § 9706(a). . . . The statute provides unambiguous instructions for the Commissioner to follow with respect to retirees who are not assigned under § 9706(a): They must remain unassigned. Thus, there is no gap for the Commissioner to fill.

This argument fails for two reasons.

First, it fails to take into account the retroactivity of the holding in *Eastern Enterprises*. Even though *Eastern Enterprises* was decided six years after enactment of the Coal Act, it had the effect of disqualifying *ab initio* Eastern-like companies from the pool to whom the Commissioner could assign retirees. The dissent's statement that the Coal Act "identified a single company—an Eastern-type company"—to whom to assign the 95 retirees at issue is literally true, but it is incomplete in that it fails to address how the assignment pool was to be determined when Eastern-like companies were disqualified *as of the time the original assignments were made*. Because *Eastern Enterprises* retroactively disqualified Eastern-like companies from assignments under the Coal Act, the Commissioner looked at the defined pool of qualified signatories as if it were 1992, when the Coal Act was enacted. She reasoned that inasmuch as Congress intended to include in the pool only those companies then "in business," *see* U.S.C. § 9706(a) (providing that retirees may be assigned only to a "signatory operator *which . . . remains in business*"), she should take the small step of construing the class of out-of-business operators to include Eastern-like companies who were constitutionally disqualified. This gap-filling is, as we conclude, entitled to *Chevron* deference.

Thus, when assigning the 95 retirees to the pool adjusted by *Eastern Enterprises*, the Commissioner followed the provisions of § 9706(a)

Barnhart v. Peabody Coal Co., 537 U.S. 149, 169 (2003). In applying § 9706 to the retirees left unassigned as the result of the decision in *Eastern Enterprises*, the Commissioner has not violated or disturbed the structure of the Coal Act. She merely removed from the pool of possible contributors those coal operators that could not constitutionally be required to contribute. Among the remaining contributors, she followed the Coal Act's assignment structure to the letter. In short, in making reassignments, the Commissioner did not change the wording of the statute, but merely followed the Supreme Court's ruling that the Coal Act may only apply to a narrower group of persons than previously thought.

In finding that the Commissioner has permissibly interpreted the Coal Act in the wake of *Eastern Enterprises*, we have also considered the legislative intent expressed by Congress to minimize the number of unassigned beneficiaries

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strictly, assigning each of the 95 retirees to the single signatory operator *then in the pool* who had employed the retiree the longest—in this case, Pittston. The retiree would have remained "unassigned" *only* if the adjusted pool had not, as of the Coal Act's enactment, contained an operator who had employed the retiree. *See* 26 U.S.C. §§ 9706(a), 9704(d). Of course, if an operator went out of business *after* the Coal Act went into effect, its retirees would also become unassigned.

Second, the dissent's proposed solution to leave the 95 retirees unassigned *for constitutional reasons* finds no explicit basis in the text of § 9706(a) and therefore cannot reflect "unambiguous instructions" of Congress, as the dissent claims. Section 9706(a) leaves unassigned only those retirees who were *never* employed by a signatory operator that was "in business" at the enactment of the Coal Act. The 95 retirees at issue were employed by signatory operators who clearly fit the definition in § 9706(a), albeit Eastern-like companies. Therefore, the Act cannot have "unambiguously expressed" Congress' intent that they become "unassigned" under § 9704(d), as the dissent proposes. Left without explicit instructions as to how to apply *Eastern Enterprises*, the Commissioner filled the gap by deciding which operators qualified for the pool as of the time of enactment and then assigning each retiree to the *one* operator in the pool who employed the retiree the longest, as provided in § 9706(a).

by assigning each retiree to a coal operator most responsible for providing benefits. As the Supreme Court has observed:

> This much is certain: the Coal Act rests on Congress's stated finding that it was necessary to "identify persons most responsible for plan liabilities," and on its express desire to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits," Energy Policy Act of 1992, Pub. L. 102-486, § 19142, 106 Stat. 3037. In the words of Senator Wallop's report delivered shortly before enactment, the statute is "designed to allocate the greatest number of beneficiaries in the Plans to a prior responsible operator. For this reason, definitions are intended by the drafters to be given broad interpretation to accomplish this goal." 138 Cong. Rec. 34001 (1992).

Barnhart v. Peabody Coal, 537 U.S. at 171-72 (footnote omitted). The Commissioner's interpretation and application of § 9706 fulfills this legislative intent. She determined that, of all the signatory coal operators to whom assignments would be lawful, Pittston employed these 95 beneficiaries *the longest.* According to the rationale underlying the Coal Act's assignment structure, that makes Pittston the coal operator most responsible for providing benefits to those 95 beneficiaries.

With respect to Pittston's argument that the Commissioner's reassignment of retirees to Pittston violated 26 U.S.C. § 7852(a), the Internal Revenue Code's severability clause, Pittston contends that "the application of an internal revenue law to one person `shall not be affected' by the invalidation of that law to another person. Yet that is exactly what the Government and Trustees have done to Pittston; they have made Pittston pay *more* because Eastern and other companies are paying *less.*" We conclude that this argument misconstrues § 7852(a).

The severability clause reads:

> If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby.

26 U.S.C. § 7852(a). From a straightforward reading of this provision, we conclude that the clause merely provides that if a provision in Title 26 applied to one party before the provision was invalidated as to other parties, it will continue to apply to that one party. It does not mean that the application of the provision to one party cannot result in changed *liabilities* after an invalidation as to other parties. Severing a statute's provisions will occasionally result in enhanced liabilities for some parties as a result of the remaining provisions. That result is not inconsistent with the idea that the *application* of the statute will not be affected as to those parties. Indeed, in accordance with § 7852(a), the Coal Act remains operative as to non-Eastern-like coal companies. Thus, even though the statute—as now applied to Pittston without Eastern-like companies in the contributing pool—may result in different liabilities, the fact and method of applying the Coal Act to Pittston have not changed.

In sum, we conclude that the Commissioner's application of 26 U.S.C. § 9706(a) in making 95 reassignments to Pittston following *Eastern Enterprises* was a permissible construction of the Coal Act.

V

Finally, Pittston contends that the Coal Act violates the Due Process Clause and Takings Clause of the Fifth Amendment. It argues that the last NBCWA that it signed was the 1974 NBCWA which, it contends, did not contemplate lifetime benefits for coal miners. According to Pittston, such lifetime benefits were first included in the 1978 NBCWA.

Accordingly, it argues, applying the Coal Act to Pittston violates the Fifth Amendment.

Pittston acknowledges, however, that its subsidiaries—"related parties" under the Coal Act—did sign the 1978 NBCWA and later agreements, and, according to our precedent, the signatory status of one related party may be imputed to other related parties, making Pittston effectively a signatory to the 1978 NBCWA and later agreements. *See A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226 (4th Cir. 2002). Pittston also acknowledges that *Massey Coal* requires us to reject Pittston's argument. In lieu of pressing the point further to this three-judge panel of the court, which is bound by *Massey*, Pittston urges us to hold this issue in abeyance until the Supreme Court decides whether to grant a petition for writ of certiorari in *Massey* or in *Berwind Corp. v. Comm'r*, 307 F.3d 222 (3d Cir. 2002) (reaching the same conclusion as *Massey*).

The Supreme Court has, since Pittston filed its brief on appeal, denied the petitions for a writ of certiorari in both *Massey* and *Berwind*. *See Massey*, 123 S. Ct. 1928 (2003); *Berwind*, 123 S. Ct. 1927-28 (2003). Accordingly, its motion to hold this claim in abeyance has been rendered moot. And on the merits of its Fifth Amendment argument, we agree with Pittston that it is foreclosed by *Massey*.

VI

In addition to its substantive contentions, Pittston argues that the district court abused its discretion in refusing to unseal documents that were sealed pursuant to a stipulated protective order.

During discovery, in order to facilitate the discovery of documents from the Bituminous Coal Operators' Association ("BCOA"), which is not a party to this case, counsel for both Pittston and BCOA agreed that certain categories of information produced in discovery would be protected from public

disclosure. On October 22, 2001, the district court issued a stipulated protective order, which both parties signed, protecting from disclosure documents "denominated by the producing person . . . as containing confidential, proprietary, commercial, or financial data." Operating under that protective order, BCOA produced 295 pages of documents to Pittston, several of which were designated as protected under the Protective Order. Pittston used the protected documents in connection with its filings on motions for summary judgment, and then filed a motion to unseal the documents, which the district court denied.

In seeking to reverse the district court, Pittston claims that it is promoting the public interest in access to the documents, as was The Washington Post in *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-54 (4th Cir. 1988)(holding that The Washington Post was entitled access to documents sealed by a protective order and used by the parties in summary judgment proceedings). Unlike the circumstances in *Rushford*, where The Washington Post did not have access to the documents, Pittston already had access to the documents covered by the protective order. Moreover, Pittston itself agreed to the sealing of the documents in order to benefit from a more open discovery from BCOA, which was not a party to the litigation.

In the circumstances, we conclude that the district court did not abuse its discretion.

AFFIRMED

WILKINS, *Chief Judge*, concurring in part and dissenting in part:

Following *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) [hereinafter "*Eastern*"], it was apparent that assignments to companies similarly situated to Eastern ("*Eastern*-type assignments"), although made at Congress' direction in accordance with the Coal Act, were unconstitutional and thus should never have been made. However, in reviewing these assignments in light of *Eastern*, the Social Security Commissioner ("the Commissioner") not only revoked the unconstitutional assignments but also reassigned the affected retirees to other companies such as Pittston. Because I believe these reassignments contravened the plain language of the Coal Act, I respectfully dissent in part from Part IV of the majority opinion. I concur in the remainder of the opinion.

Initially, it is important to recognize that with regard to each retiree, at the time of the Commissioner's review, 26 U.S.C.A. § 9706(a) (West 2002) either identifies a single company for assignment or does not authorize assignment at all. The Commissioner's narrow task with regard to each retiree is to determine whether § 9706(a) identifies a company to which the retiree can be assigned. If so, the assignment is made, and the company to which the retiree is assigned funds the retiree's benefits. *See id.* If not, the retiree's benefits are funded by all companies in proportion to the number of retirees they have been assigned. *See* 26 U.S.C.A. § 9704(d) (West 2002) (requiring operators to fund benefits of eligible beneficiaries "who are not assigned under section 9706"); 26 U.S.C.A. § 9704(f)(l) (West 2002).

The question thus becomes how to apply *Eastern* retroactively to § 9706(a). In the case of each of the 95 retirees at issue here, the plain language of § 9706(a) at the time the original assignments were made identified a single com-

pany—an *Eastern*-type company.[1] However, because assignments to these companies were unconstitutional, the Commissioner could not lawfully perform the only act authorized by § 9706(a).

The majority concludes that the Commissioner's inability to perform this act leaves a gap in the statute. *See* ante, at 28-32 & n.3. I disagree. The statute provides unambiguous instructions for the Commissioner to follow with respect to retirees who are not assigned under § 9706(a): They must remain unassigned.[2] Thus, there is no gap for the Commissioner to fill.

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[1] The majority contends that applying *Eastern* retroactively could somehow change which operator § 9706(a) identifies. *See* ante, at 30-32 n.3. That is incorrect. In the case of each of the 95 retirees at issue here, *Eastern* only prevented *assignment* of the retiree to the single company that § 9706(a) identified. It did not somehow create an ambiguity regarding the identification of that company. In other words, the "signatory operator" remaining "in business" "which employed the . . . retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement" is no different after *Eastern* than it was before. The majority reaches the opposite conclusion by reasoning that, under *Eastern*, the *Eastern*-type companies might reasonably be viewed as being no longer "in business," thereby leaving the door open to assignment to other, non-*Eastern*-type companies. However, that interpretation of "in business" is plainly foreclosed by the definition Congress gave that term. *See* 26 U.S.C.A. § 9701(c)(7) (West 2002) (providing that company remains "in business" so long as it continutes to "conduct[ ] or derive[ ] revenue from any business activity"); *infra* n.3.

[2] The majority contends that my "proposed solution to leave the 95 retirees unassigned for constitutional reasons finds no explicit basis *in the text of § 9706(a)*." Ante, at 31 n.3 (emphasis omitted). The majority similarly notes that Congress did not unambiguously express its intent to leave retirees unassigned when the plain language of § 9706(a) would require *Eastern*-type assignments. From these premises, the majority concludes that the Commissioner lacked explicit instructions regarding how to proceed with respect to the 95 retirees at issue here. *See id.*

The majority reaches the opposite conclusion by effectively dividing the mandate of § 9706(a) into two distinct commands—a general requirement that the Commissioner assign each retiree to a signatory operator and a more specific set of instructions about how to select the appropriate operator for such an assignment. On this reading, there *is* a gap; the Commissioner must make an assignment but cannot adhere to Congress' directions about how to do this, and the Commissioner therefore must formulate her own assignment rules. In my view, however, this bifurcation of § 9706(a) misreads the statute. Congress plainly did not require that every retiree be assigned to a signatory operator whenever such an operator is available; for example, as the majority notes, if the operator to whom a retiree is originally assigned goes out of business, the retiree is not *re*assigned, but instead becomes *un*assigned, *see* 26 U.S.C.A. § 9704 (f)(2)(B) (West 2002). Thus, the better reading of § 9706(a) is that Congress intended for the Commissioner to make assignments under that provision only when she can do so consistently with its plain language; if not, the Commissioner must leave the retiree unassigned rather than devise additional assignment rules.

The majority's conclusion does not follow from its premises. The Commissioner's direction here comes not simply from the *text* of the Coal Act, but from the text read in light of *Eastern.* The text of the Coal Act unambiguously authorized the Commissioner to assign each of the 95 retirees at issue here to an *Eastern*-type company. And, *Eastern* negated that authority. Prohibited from making the only assignment that Congress had authorized, the Commissioner's work was complete. She had full directions—from the Coal Act and from the Constitution—and there was no gap left to fill. To be clear, that the Commissioner's assignments of these 95 retirees to Pittston were unauthorized is not established by the *presence* of an unambiguous expression of Congressional intent to have the Commissioner leave retirees unassigned when the language of the Coal Act would require that they be assigned to *Eastern*-type companies. Rather, it is based on the *absence* of any authority to make any assignments other than those that Congress authorized.

Nevertheless, the Commissioner did not stop there. Unable to make the assignments that Congress actually authorized, the Commissioner created a new assignment plan and assigned the 95 retirees at issue here to Pittston, a company that would not have been liable under the plan that Congress established.[3] This rewriting of the statute—without any authority from Congress—is impermissible. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (explaining that "an agency literally has no power to act . . . unless and until Congress confers power upon it"); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (emphasizing that a federal agency, as a "creature of statute," has *"only* those authorities conferred upon it by Congress") (internal quotation marks omitted). As the Supreme Court stated in another case interpreting the Coal Act, "[o]ur role is to interpret the language of the statute enacted by Congress. . . . We will not alter the text in order to satisfy the policy preferences of the Commissioner." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002).

The majority notes that allowing reassignment to companies like Pittston serves the purposes that Congress sought in enacting the Coal Act. *See* ante, at 31-33. With respect to the majority, even if it has correctly identified the *purposes* of the Coal Act, those purposes are irrelevant when the *language* of the Coal Act plainly provides no authority for the agency action. *See Barnhart*, 534 U.S. at 461-62. If Congress wanted the Commissioner after *Eastern* to be able to create a new assignment plan, it was incumbent on Congress to have pro-

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[3] The Commissioner's new assignment plan removed *Eastern*-type companies from the pool of signatory operators to whom retirees could be assigned; thus, retirees who worked for such operators could be assigned to an operator who remained within that pool. But neither the definitions of "signatory operator," *see* 26 U.S.C.A. § 9701(c)(1) (West 2002), and "in business," *see id.* § 9701(c)(7), nor the assignments provision, *see id.* § 9706(a), provides for narrowing the pool in this manner.

vided the Commissioner with that authority. Because Congress did not do so, I would hold that the 95 reassignments to Pittston were *ultra vires* and that Pittston thus is entitled to a refund of the additional premiums it paid as a result of those reassignments.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Filed August 20, 2002]

Civil Action Numbers 3:97CV294; 01CV273

THE PITTSTON CO., *et al.*
Plaintiffs.

v.

UNITED STATES
Defendant and Third-Party Plaintiff

v.

MICHAEL H. HOLLAND, *et al.*
Third-Party Defendants.

MEMORANDUM OPINION

This matter comes before the Court on Motions for Summary Judgment filed by each party in the case—The Pittston Company; the United States; and Michael H. Holland on behalf of the Trustees. For the reasons discussed below, the Motions for Summary Judgment filed by the United States and the Trustees are granted and Pittston's Motion for Summary Judgment is denied. The parties agree that the Court should refrain from ruling on Count Three in Civil Action No. 01CV273 until the United States Supreme Court hands down its opinion in *Barnhart v. Peabody Coal Co.*, Case No. 01-705. Accordingly, that count is stayed pending the Supreme Court's ruling.

I.

The Pittston Company and numerous Pittston subsidiaries (collectively "Pittston") filed suit in 1997 against the United States (Civil Action No. 97CV294), seeking a refund of taxes that it alleges were illegally collected between tax years 1993 and 1996. The taxes were collected under the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"), 26 U.S.C. §§ 9701-9722.[1]

Pittston alleged in the first count of the Complaint that the Coal Act violated the non-delegation and separation of powers doctrines of the United States Constitution by placing government powers and revenues in the hands of a private entity—namely the Board of Trustees of the fund ("the Board" or the "the Trustees"). In the second count, Pittston alleged that it was entitled to a refund for overpayments made between 1993 and 1996. The United States moved to dismiss on grounds that the Coal Act premiums were not taxes and

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[1] Congress enacted the Coal Act so that United Mine Workers of America ("UMWA") retirees and their beneficiaries could receive benefits from a statutory fund known as the UMWA Combined Benefit Fund ("the Combined Fund"). The Combined Fund replaced two private health plans that had been funded through provisions of collective bargaining agreements. A detailed discussion of the history of benefits for coal miners and the circumstances that led to the enactment of the Coal Act is contained in *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).

Beneficiaries of the Combined Fund were assigned to signatories of collective bargaining agreements with the UMWA. These signatories ("assigned operators") paid assessments to the Combined Fund based on the number of beneficiaries assigned to them. Pittston represents that, between 1993 and 1996, it paid more than $38 million in assessments on more than 5,000 beneficiaries assigned to it.

In 1996, Pittston filed tax refund claims for each tax year between 1993 and 1996, seeking to recover all amounts paid to the fund for each tax year. The Internal Revenue Service did not allow the claims.

that the claim was barred by *res judicata*. The Court, on September 11, 1997, granted the Motion to Dismiss in regard to the first count, but denied it in regard to the second count.[2]

On October 9, 1997, the United States filed a Third-Party Complaint against the Trustees and the Combined Fund, seeking indemnification for any amounts it might be required to pay Pittston. On February 3, 1998, the Court entered judgment against the United States on Count Two and, on September 9, 1998, entered judgment against the Trustees on the third-party liability claim. The Court also denied a motion by Pittston to amend its Complaint.

All parties appealed to the United States Court of Appeals for the Fourth Circuit. Pittston appealed the dismissal of its constitutional claim. The United States and the Trustees appealed the judgments against them on the second count. The parties eventually settled the overpayment claims contained in the second count and the Fourth Circuit, in December 1999, reversed the order dismissing the constitutional claims contained in the first count. *Pittston Co. v. United States*, 199 F.3d 694 (4th Cir. 1999).[3]

This Court then denied a motion by the United States to dismiss Count One and granted Pittston leave to amend its

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[2] In a Memorandum Opinion, the Court found that Pittston's constitutional claim arose from the same transaction that Pittston and other assigned operators had challenged in an earlier lawsuit decided by the United States District Court for the Northern District of Alabama. As a result, the Court dismissed the first count, citing *res judicata. The Pittston Company, et al. v. United States, et al.*, Memorandum Opinion, Civil Action No. 97CV294 (September 11, 1997).

[3] The Fourth Circuit held that the Court had correctly concluded that the Coal Act assessments are taxes, but had erred in dismissing the first count on the grounds of claim preclusion. The Fourth Circuit also found the Court's denial of Pittston's motion to amend its Complaint to be error. *Pittston*, 199 F.3d at 706.

Complaint. Pittston filed an Amended Complaint containing two counts: (1) That the Coal Act violates the Due Process and Takings Clauses of the Fifth Amendment, the non-delegation and separation of powers doctrines, and the Ex Post Facto Clause of the United States Constitution; and (2) That § 9706(a)(3) of the Coal Act is not severable and, therefore, the Coal Act must be invalidated. Both the United States and the Trustees moved to dismiss the Amended Complaint. On August 3, 2001, this Court dismissed the Fifth Amendment claim contained in the first count and dismissed the second count altogether. The non-delegation and separation of powers claims remain.[4]

In April 2001, prior to the Court's ruling on the Motion to Dismiss the Amended Complaint in Civil Action No. 97CV294, Pittston filed a second lawsuit against the Defendants (Civil Action No. 01CV273), seeking a refund on taxes paid to the Combined Fund for the tax years 1997 through 2000. This lawsuit, which has been consolidated with Civil Action No. 97CV294, contains four counts. Count One alleges violations of the non-delegation and separation of powers doctrines and the Fifth Amendment.[5,6] The second

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[4] Pittston then sought to amend its Complaint by adding the following sentence to ¶ 7 of the Amended Complaint: "Plaintiff The Pittston Company was a signatory to the 1974 National Bituminous Coal Wage Agreement ("NBCWA") but not a signatory to the 1978 or later NBCWAs; each of the remaining plaintiffs was a signatory to the 1978 NBCWA or to one or more of the later NBCWAs." The Court, however, denied Pittston's attempt to clarify its signatory status, finding that adding such an amendment to the Complaint would have no impact on the case since the Fifth Amendment claims had already been dismissed. *The Pittston Company, et al. v. United States, et al.*, 97CV294, Memorandum Opinion (E.D. Va. Oct. 31, 2001).

[5] The Court allowed Pittston to amend its Complaint in Civil Action No. 01CV273 to indicate that Pittston was not a signatory to the 1978 NBCWA.

count alleges that the al Act should be invalidated because it is not severable.[7]

The third and fourth counts in Civil Action No. 01CV273 are new. The third count seeks relief for assignments made to Pittston after October 1, 1993—a deadline for assignments imposed by statute. The fourth count seeks a refund and other relief for these assignments and other assessments against Pittston.

Each of the parties has now moved for summary judgment on the outstanding issues in the two cases. These issues are as follows:

(1) The non-delegation and separation of powers claims contained in the first count of Civil Action No. 97CV294 and in the first count of Civil Action No. 01CV273;

(2) The Fifth Amendment claim found in the first count of Civil Action No. 01CV273;

(3) The non-severability claim found in the second count of Civil Action No. 01CV273;

(4) The claim concerning assignments after October 1, 1993 contained in the third count of Civil Action No. 01CV273; and

(5) The claim concerning a refund for assignments, which is found in Count Four of Civil Action No. 01CV273.

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[6] The Court rejected Pittston's Fifth Amendment claims—based on violations of the Takings Clause and Due Process Clause—in Civil Action No. 97CV294. However, these claims remain pending in Civil Action No. 01CV273.

[7] The Court has already dismissed this claim in Civil Action No. 97CV294; however, the claim remains pending in Civil Action No. 01CV273.

II.

Under Rule 56 of the Federal Rules of Civil Procedure, a court considering a motion for summary judgment must consider the entire record in the light most favorable to the non-moving party. The moving party must demonstrate that no genuine issue of material fact exists and that it is therefore entitled to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). The moving party has the initial burden of demonstrating a failure to prove a material element, but, if that burden is met, the non-moving party then must then set forth specific facts to prove the existence of a genuine issue of material fact. *Id.*

A. Non-Delegation and Separation of Powers Claims

The Supreme Court recently reiterated the proper framework for analyzing the propriety of a delegation of Congressional power[8], stating that "when Congress confers decision-making authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).[9] In such cases, the agency to which power is delegated may not cure an unlawful delegation of legislative power by adopting its own limited interpretation of

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[8] The roots of the non-delegation doctrine are in Article I, Section 1 of the U.S. Constitution. The non-delegation doctrine dictates that "Congress may not delegate its legislative authority to other branches of the federal government." *United States v. DesAnges*, 921 F.Supp. 349, 354 (W.D. Va. 1996) ((citing *Mistretta v. United States*, 488 U.S. 361, 371 (1989)).

[9] The Supreme Court must look back to the days of the New Deal to find the two instances in which it has found this "intelligible principle" to be lacking in a challenged statute. *Whitman*, 531 U.S. at 474 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 333 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

the statute. *Id.*, at 472-73. Rather, the courts retain the power to determine whether the delegation is permissible.[10]

The Coal Act, however, necessitates a different analysis. Congress, in enacting the Coal Act, 26 U.S.C. §§ 9701-22, did not delegate authority to a government agency, but rather to a private entity—the Board of Trustees of the Combined Fund. Pittston asserts that Congress has unconstitutionally delegated its power to tax[11] and the executive power to enforce laws to a private entity, thereby violating the non-delegation and separation of powers doctrines.[12] The Fourth Circuit has made it abundantly clear that Coal Act premiums are taxes. *Pittston v. United States*, 199 at 702 (citing *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996)).

Delegations of essential legislative powers to private parties with an interest in the business or matter to which the delegation pertains are disfavored. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also Schechter*, 295 U.S. at 529 ("The Congress is not permitted to abdicate or to transfer to

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[10] A detailed discussion of the evolution of the non-delegation doctrine is contained in Steven Huefner' s article, *The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More Than a "Dime's Worth of Difference"*, 49 Cath. U.L. Rev. 337 (Winter 2000).

[11] The United States Constitution grants Congress the power to "lay and collect Taxes." U.S. Const., Art. I, § 8, cl. 1.

[12] Pittston's separation of powers argument is closely related to its non-delegation argument. The point is simply that, while the Executive Branch has the power to enforce laws, Congress has, in enacting the Coal Act, delegated both legislative and executive power to the Trustees. Congress has thus has violated the non-delegation and separation of powers doctrines.

Analytically, the arguments are entwined. Since the Court, as discussed in more detail below, finds that no violation of the non-delegation doctrine has occurred, it follows that no violation of the separation of powers doctrine has occurred. The Coal Act does not represent an unlawful delegation of either legislative or executive power.

others the essential legislative functions with which it is thus vested."). Such action represents "legislative delegation in its most obnoxious form," since it effectively grants an interested private party the authority to "regulate the affairs of an unwilling minority." *Id. Carter* does not, however, make all delegations of power to private entities improper.

Congress may delegate power to non-government entities if the delegation of power provides for sufficient oversight of the private entity. *See generally Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (finding that Congress, in delegating some price-fixing authority to a private industry entity, the Bituminous Coal Code, had entrusted sufficient oversight and authority to a government entity, the National Bituminous Coal Commission, to make the delegation constitutional). The *Sunshine Anthracite* Court noted that, since the Code was subordinate to the Commission, Congress had not improperly delegated power to industry: "[The Commission], not code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid." *Id.* at 399 (citation omitted).[13]

The Third Circuit applied the principles of *Sunshine Anthracite* to the Beef Promotion Act's delegation of authority to a private beef industry entity in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S.

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[13] *Sunshine Anthracite* involved questions about the constitutionality of the Bituminous Coal Act of 1937, which represented a Congressional response to the *Carter* Court's holding that the Bituminous Coal Conservation Act of 1935 was unconstitutional. In the 1937 Act, Congress allowed the Code, composed of coal producers, to propose minimum prices, but gave the Commission the power to fix prices. *Sunshine Anthracite*, 310 U.S. at 387-388.

1094 (1990).[14] It found that the Secretary of Agriculture had sufficient authority over the Cattlemen's Beef Promotion and Research Board to bring the delegation within constitutional boundaries. *Id.* at 1128-29.[15] The Third Circuit specifically noted that the Secretary had "pervasive surveillance and authority" over the Board, including the power to appoint Board members; the power to remove Board members under certain circumstances; the power to attend Board meetings; the final authority to approve Board budgets, plans, and projects; and the power to approve Board contracts. *Id.* Ultimately, the Third Circuit determined that the Board served an advisory function and, when it came to the collection of assessments, a ministerial function. Congress had set the assessments and the Secretary retained the power to decide how the funds would be spent. *Id.*, at 1129.

As demonstrated by *Sunshine Anthracite* and *Frame*, when Congress delegates power to a private entity, the appropriate

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[14] The Third Circuit also found that Congress had not unlawfully delegated legislative authority to the Secretary of Agriculture. *Frame*, 885 F.2d at 1128.

[15] The Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11, was at issue in *Frame*. Generally, the Act directed the Secretary of Agriculture to promulgate a Beef Promotion and Research Order that would help the Beef Industry finance and create a campaign promoting beef. The Act authorized the creation of a Cattlemen's Beef Promotion and Research Board ("the Cattlemen's Board") and a Beef Promotion Operating Committee ("the Operating Committee") that would administer the Order. *Frame*, 885 F.2d at 1121-23.

The statute gave the Cattlemen's Board fairly broad powers, including the ability to administer the Order, make rules effectuating the Order, elect members of the Operating Commitee, and approve budgets. *Id.*, at 1123 (citing 7 U.S.C. § 2904(2)(A)-(D)). Congress dictated many of the provisions to be included in the Order, but also allowed for the inclusion of additional terms necessary to effectuate the Order so long as they were not inconsistent with the statute. *Id.*, at 1122-23 (citing 7 U.S.C. § 2904 (1)-(12)).

analytical question is whether Congress has enacted the legislation with sufficient specificity that Congress—and not the private party—has made the essential determinations and exercised, not delegated, law-making authority.[16] This point is best illustrated by considering the statute struck down in *Carter*. In that case, the Bituminous Coal Conservation Act of 1935 provided:

> Whenever the maximum daily and weekly hours of labor are agreed upon in any contract . . . negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement . . . negotiated by collective bargaining in any district . . . between representatives of producers of more than two-thirds of the annual tonnage production of such district . . . during the preceding calendar year, and representatives of the majority of the mine workers therein . . . shall be accepted as the minimum wages . . . .

Carter, 298 U.S. at 283-84 (quoting the Bituminous Coal Conservation Act of 1935, 49 Stat. 991). Congress made no essential or even substantive determinations in the Bituminous Coal Conservation Act of 1935. In fact, Congress delegated the decision-making process to private industry without even attempting to put in place guidelines to which the industry could adhere in setting the hours and wage

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[16] In evaluating the Defendants' Motion to Dismiss, this Court looked at various provisions of the Coal Act and defined the issue for the parties: "The question raised here is whether these sections together render the Coal Act a constitutional exercise of the taxing power." *The Pittston Company, et al. v. United States, et al.*, 97 CV294, Memorandum Opinion (E.D. Va. August 3, 2001).

agreements. It is precisely this broad, sweeping abdication of law-making authority that the Supreme Court rejected in *Carter*.

The Coal Act at issue here stands in marked contrast to statute invalidated by the *Carter* Court. Congress, in enacting the Coal Act, specified a process for the assignment of beneficiaries. 26 U.S.C. § 9706.[17] Furthermore, Congress established a specific formula dictating how annual premia paid by assigned operators to the Combined Fund are to be calculated. 26 U.S.C. § 9704.[18] The tax imposed is perhaps not as easily understandable as the $1.00-per-head-of-cattle assessment that Congress established in the Beef Promotion Act, but it is clear that Congress, not a private entity, set the tax at issue in this case.[19] Consequently, Pittston's position that the Trustees and the Combined Fund have some sort of

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[17] The statute details a process by which the Commissioner of Social Security assigns beneficiaries. Under the three-tier system, eligible retirees are first assigned to the signatory of the 1978 coal wage agreement or a later agreement that most recently employed the beneficiary for at least two years. 26 U.S.C. § 9706(a)(1). The second tier requires the assignment of the retiree to the signatory of the 1978 wage agreement or a later agreement that most recently employed the beneficiary. 26 U.S.C. § 9706(a)(2). If the retiree cannot be assigned under either the first or second tier, then the statute directs that the retiree be assigned to the signatory operator that employed the retiree for "a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement." 26 U.S.C. § 9706(a)(3).

[18] According to the statute, the annual premium paid to the Combined Fund equates to the sum of three other premia. The statute then addresses how each of these three premia—the health benefit premium, the death benefit premium, and the unassigned beneficiaries premium—are calculated. 26 U.S.C. § 9704.

[19] In *Frame*, the Third Circuit cited the fact that Congress set a $1.00-per-head-of-cattle assessment as an indication that Congress had not delegated legislative authority. *Frame*, 885 F.2d at 1128.

unfettered power to assess taxes is disingenuous.[20,21] Rather, the statute clearly establishes a methodology for determining who is taxed and how that tax is determined.

Within the text of the Coal Act, Congress also established the procedure for selecting the Board of Trustees. The Board shall contain one member designated by the Bituminous Coal Operators' Association ("the BCOA"), one member designated by the three employers with the greatest number of eligible beneficiaries, and two members designated by the United Mine Workers of America ("the UMWA"). 26 U.S.C. § 9702. These Board members then select three additional individuals to serve on the Board. *Id.* Pittston's assertion that this selection process essentially turns control of the Board and the Combined Fund over to an alliance of the BCOA and the UMWA, while perhaps understandable, misses the point.[22] Congress did not make a sweeping delegation of legislative and executive power, but rather decided to establish a tax to fund a health benefit plan, determined who would be taxed, provided the methodology for determining the amount of the

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[20] The Coal Act even specifies the assessment of a $100-per-day fine for an assigned operator that fails to pay a premium under § 9704. 26 U.S.C. § 9707.

[21] The fact that a private entity serves as the tax collector is not problematic. *See generally Kaucky v. Southwest Airlines*, 109 F.3d 349 (7th Cir. 1997) (discussing how refund suits should proceed in cases where Congress has made a private entity the "collection agent" for the Internal Revenue Service).

[22] Yet, to portray the Board of Trustees as a battleground between the minority—Pittston—and the majority—the alleged BCOA/UMWA coalition—is inaccurate. Pittston's designated Trustee, for instance, has routinely voted with the BCOA - and UMWA-designated Trustees in appointing and re-appointing the "neutral" Trustees. Combined Fund Meeting Minutes (January 21, 1993); Combined Fund Meeting Minutes (April 20, 1993); Combined Fund Meeting Minutes (May 24, 1995); and Combined Fund Meeting Minutes (May 19, 1997).

tax, and then put in place a specific procedure for selecting the Trustees that would create the plan.

Pittston makes some effort to ground its argument that the Combined Fund unconstitutionally levies taxes in the language of the Coal Act. David J. Laurent, an expert hired by Pittston, asserts that § 9704(a) allows the Combined Fund to issue premium demands. Deposition of David J. Laurant, at 175 (March 14, 2002).[23] The Coal Act dictates that the Social Security Administration determine the annual premium, but the Combined Fund actually issues the letter to assigned operators indicating how much money they must pay. Deposition of David J. Laurant, at 175-78 (March 14, 2002). Regardless, the Coal Act, not the Combined Fund, establishes the procedure for determining how much an assigned operator is taxed. Mr. Laurant even acknowledges that the Coal Act does not give the Trustees the authority to set an annual premium. Deposition of David J. Laurant, at 181 (March 14, 2002).

A review of the Coal Act, thus, reveals that Congress carefully reserved the key determinations for itself. It established who would be taxed and how the tax was to be calculated. But Congress, in delegating authority in the Coal Act, did even more to define the operation of the Combined Fund and constrain the Trustees. The Coal Act, for instance, places a five percent limitation on the percentage of premiums paid that may be used to cover administrative costs.

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[23] Pittston supports its Motion for Summary Judgment with an analysis of the Coal Act conducted by Mr. Laurent, an attorney who has represented employers in the coal industry, published articles on Coal Act issues, and been involved in efforts to amend the Coal Act. Mr. Laurant, at the request of Pittston, analyzed certain aspects of the Coal Act in regard to the case currently before the Court. His conclusions are contained in a January 14, 2002 letter. Letter from David J. Laurant to Wade M. Massie (January 14, 2002); *see also* Deposition of David J. Laurant (March 14, 2002).

26 U.S.C. § 9703(d). Congress also addressed, in some detail, the health benefits to be provided, indicating that the Trustees should provide health care on a "prepaid risk basis" and that coverage should "to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992." 26 U.S.C. § 9703(b).[24]

Unlike the boundless delegation of power so staunchly criticized in *Carter*, the Coal Act establishes a clear framework within which the private party—the Trustees—must carry out carefully defined tasks. The legislation undeniably leaves certain tasks, such as creating the health care plan, to the Trustees. Yet, no law-making authority or key legislative or executive responsibility has been left to the Combined Fund or the Trustees.

In fact, Pittston's criticism that the Coal Act unconstitutionally delegates enforcement powers falls apart under close scrutiny. The centerpiece of Pittston's argument on this point is that Congress has given the Trustees standing to bring lawsuits in regard to Coal Act premiums. 26 U.S.C. § 9721. Giving a private party the right to sue, however, is not uncommon. The Supreme Court has indicated that, since Congress establishes statutory rights, it is "entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241

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[24] The Coal Act also indicates that the Combined Fund is an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"). 26 U.S.C. § 9702(a)(3)(B). As such, the Trustees are bound by a fiduciary duty to act on behalf of the plan's beneficiaries. 29 U.S.C. § 1104(a). Thus, the provisions of the Coal Act provide yet another example of how Congress carefully defined the duties of the Trustees and limited their ability to act.

(1979); *see also Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp.*, 652 F.Supp. 620, 626 (D. Md. 1987) ("Numerous federal statutes provide for concurrent enforcement by executive agencies and citizens.") (citing statutes).

Pittston's criticism of the Coal Act generally does not concern the language of the legislation itself, but rather relates to particular actions taken by the Trustees. Pittston asserts that private influence controls the Combined Fund. In support of this allegation, Pittston argues that the Trustees improperly tied the settlement of the "evergreen" case[25] to the resolution of separate lawsuits Pittston had initiated against the BCOA and the UMWA.[26,27] It also asserts that the Combined Fund had failed to require BCOA members to make a $60 million payment[28] and that the Trustees improp-

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[25] The "evergreen" lawsuit, *UMWA 1974 Pension Trust v. Pittston Co.*, 784 F.Supp. 658 (D.C. Cir. 1992), involved an effort by the UMWA Fund to force Pittston to make certain payments to the UMWA funds. After Congress enacted the Coal Act, the "evergreen" claims were assigned to the Combined Fund. 26 U.S.C. §§ 9702(a)(2), 9708.

[26] Pittston sued the UMWA for breaching an agreement to oppose any legislation like the Coal Act. Pittston sued the BCOA for a breach of duty in negotiating NBCWAs.

[27] Ultimately, the Trustees did demand a global settlement. "The settlement would be a comprehensive settlement with the dismissal of the Pittston evergreen case brought by the Trustees, the case of *Pittston v. BCOA, et al.* . . . and *Pittston v. UMWA* . . . .". Letter from Julia Penny Clark to the Honorable Charles H. Weiner (November 30, 1995). Judge Weiner mediated the "evergreen" case.

[28] According to the Coal Act, the 1988 agreement operators—BCOA members—shall make payments between February 1, 1993 and September 30, 1994 to pay off expenses of the merged plans that remain unpaid as of February 1, 1993. 26 U.S.C. § 9704(i). The 1988 operators did not pay off the deficit, and the merged plans instead eventually collected the money from obligations owed to the two trusts. Deposition of Carl F. Tennille, 61 (January 24, 2002).

erly decided to include "after-acquired dependants[29] in the Combined Fund to the benefit of the BCOA.[30]

Pittston believes that these examples, among others cited in its brief, demonstrate that the Trustees and the Combined Fund are guided by private interest.[31] While some of the facts presented may well support such a position, the argument itself is misguided. The United States and the Trustees are correct in their assertion that the Coal Act was either constitutional or unconstitutional at the moment Congress enacted it. Subsequent actions taken by the Trustees are not central to the analysis, since they do not necessarily reflect the authority delegated by Congress. Any actions taken by the

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Pittston contends that the BCOA's success in convincing the Trustees to delay payment provides further evidence of private influence run rampant within the Combined Fund. Pittston argues that, instead of delaying payment, the statute dictated that the 1988 operators pay and then be given credit against later obligations if money later came in and eliminated the deficit. 26 U.S.C. § 9704(i).

[29] An "after-acquired dependant" is an individual who became a dependant of a miner after July 20, 1992.

[30] The Trustees elected to include after-acquired dependants despite receiving at least one legal opinion that the "language of the Coal Act" specifically prohibited such enrollments and that any terms of the trust allowing such enrollments "are directly contrary to the authorization supplied by Congress." Executive Summary from Marc Gertner to Trustees, 11 (February 17, 1995).

Pittston contends that, by putting the after-acquired dependents in the Combined Fund, the Trustees avoided putting them in the 1992 Plan, which is primarily funded by the BCOA.

[31] It cannot be said, however, that the Trustees are mere minions of the BCOA and UMWA. In support of this point, it is sufficient to note that the Combined Fund has been involved in litigation against several BCOA members in recent years. *See generally Peabody Coal Co. v. Massanari*, No. 00-6239, 2001 U.S. App. LEXIS 14471(6th Cir. 2001), cert. granted., 122 S. Ct. 918 (Jan. 22, 2002); *Apogee Coal Co., et al. v. Holland, et al.* 98-C-2858-S (N.D. Ala. June 1, 2001), affirmed, No. 01-13691 (11th Cir. July 12, 2002).

Trustees could, in fact, conflict with the language of the Coal Act and the authority delegated by Congress. The issue in this case is not whether the Trustees have always acted within the parameters of the Coal Act, but whether Congress, in passing the legislation, surrendered too much power to the Trustees. The Court considers the language of the Coal Act to be critical to resolving this issue.

Such an approach is no different than that employed by other courts. The *Carter* Court, in invalidating a statute, focused on the language of the legislative enactment. *Carter*, 298 U.S. at 310-11. In a case of more recent vintage, the Third Circuit, in applying the non-delegation doctrine to the Beef Promotion Act, looked at specific provisions of that act to determine that Congress had allowed for sufficient government oversight. *Frame*, 885 F.2d at 1128-29. In *Schechter*, the Supreme Court stated: "Accordingly, we look to the statute to see whether Congress has overstepped these limitations,—whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer the function to others." *Schechter*, 295 U.S. at 530.

Thus, for Pittston to succeed on its argument that the Coal Act represents an unconstitutional delegation of legislative or executive authority and a violation of the separation of powers doctrine, it must base that argument on what Congress said or left unsaid in the Coal Act. Pittston has been unable to point to provisions within the Coal Act that represent an unconstitutional delegation of either legislative or executive power. In contrast, the United States and the Trustees have demonstrated that the text of the Coal Act shows very clearly that Congress made the key determinations and put a framework in place to which the Trustees must adhere.

There is no genuine issue of material fact relating to the non-delegation and separation of powers doctrines that is in

dispute. The provisions of the Coal Act are clear and they indicate that Congress, in enacting the Coal Act, did not improperly delegate legislative or executive powers to a private entity. Accordingly, summary judgment is awarded to the United States and the Trustees on this issue. Pittston's Motion for Summary Judgment is denied.

B. Fifth Amendment Claim

In Civil Action No. 97CV294, the Court rejected Pittston's argument that the Coal Act violates the Takings Clause of the Fifth Amendment. However, the same claim remains pending in Civil Action No. 01CV273.[32] Pittston has essentially adopted the same arguments it presented in Civil Action No. 97CV294. The only difference is that the Court allowed Pittston to amend its Complaint so that ¶ 7 contains the following sentence: "Plaintiff The Pittston Company was a signatory to the 1974 National Bituminous Coal Wage Agreement ('NBCWA') but not a signatory to the 1978 or later NBCWAs; each of the remaining plaintiffs was a signatory to the 1978 NBCWA or to one or more of the later NBCWAs." *The Pittston Company et al. v. United States, et al.*, Civil Action No. 01CV273, Amended Complaint, ¶ 7.

This addition has no real impact on the Court's reasoning.[33] The Court has previously held that, regardless of whether Pittston is a signatory to the 1978 NBCWA or a later NBCWA, Pittston is not analogous to Eastern Enterprises, the petitioner in *Eastern Enterprises v. Apfel*, 542 U.S. 498 (1998). The Court's reasoning was based on a finding that Pittston could not establish sufficient similarity with Eastern to prevail on its Fifth Amendment claim. The Court held that "Eastern is a non-signatory, Pittston is a signatory. Eastern is not connected to any signatory, all the Plaintiffs are signato-

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[32] Included with the Fifth Amendment claim is an allegation that the assignments violate the Ex Post Facto Clause of the United States Constitution.

ries and connected to signatories." *The Pittston Company, et al., v. United States, et al.*, Civil Action No. 97CV294, Memorandum Opinion (E.D. Va. Aug. 3, 2001).[34]

With the exception of the aforementioned change to ¶ 7 of the Amended Complaint and the time frame to which the action applies, the relevant facts in Civil Action No. 01CV273 are largely the same as in Civil Action No. 97CV294. The Court, therefore, applies the same reasoning and reaches the same conclusion—that the undisputed facts do not show a sufficient similarity between Pittston and Eastern for Pittston to succeed on its Fifth Amendment claim. Indeed, the parties do not dispute that Pittston was a signatory to the 1974 NBCWA and that each of the remaining Plaintiffs was a signatory to the 1978 NBCWA or to a later NBCWA. Pittston is signatory and each of the Plaintiffs are signatories and connected to signatories. Accordingly, summary judgment is awarded to the United States and the Trustees. Pittston's Motion for Summary Judgment is denied.

C. Non-Severability Claim

The Court has already held, in Civil Action No. 97CV294, that "Congress would have enacted the Coal Act without the provisions found to be unconstitutional" and that, once the unconstitutional portion is removed, the Coal Act remains functional. *The Pittston Company, et al., v. United States, et al.*, Civil Action No. 97CV294, Memorandum Opinion (E.D.

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[33] In fact, in denying Pittston's Motion to Amend to Clarify Signatory Status in Civil Action No. 97CV294, the Court noted that it had already rejected Pittston's Fifth Amendment claim in that case and that, even if the Complaint had been amended to include the sentence clarifying its signatory status, such an Amended Complaint would still not have been sufficient to survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *The Pittston Company, et al. v. United States, et al.*, Civil Action No. 97CV294, Memorandum Opinion (E.D. Va. Oct. 31, 2001).

[34] The Court then dismissed Pittston's Fifth Amendment claims. *Id.*

Va. Aug. 3, 2001). This issue remains before the Court in Civil Action No. 01 CV273 and each of the parties has sought summary judgment on this issue.

Pittston adopts the same arguments that it did in Civil Action No. 97CV294. Essentially, Pittston asserts that Congress would not have enacted the Combined Fund provisions of the Coal Act without the inclusion of super-reachback companies like Eastern Enterprises. Consequently, Pittston believes that, by allowing the statute to stand in the wake of the *Eastern Enterprises* ruling, the Court would essentially be giving effect to a statute that Congress would not have enacted.

The law on severability is clear. Even if a portion of an act is held unconstitutional, the remainder can stand as good law unless it is clear that the legislature would not have enacted those portions without the invalid sections and that the remaining portions cannot function as law without the invalid sections. *United States v. Jackson*, 390 U.S. 570, 585-86 (1968). The severability clause of the Internal Revenue Code and the provision of additional funding for the Coal Act in Section 501 of Public Law 106-113 indicate that Congress would have enacted the Coal Act without § 9706(a)(3) being applicable to Eastern-like companies. The Court concludes that Congress would have enacted the Coal Act without § 9706(a)(3) being applicable to Eastern-like companies. The Coal Act also remains functional after the unconstitutional portion is removed.[35]

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[35] Pittston has also failed to overcome the strong presumption of severability created by the existence of the severability provision in the Internal Revenue Code. *See generally Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) (stating that, when a severability clause exists, the unconstitutional portion of a statute may be severed without rendering the rest of the statute invalid unless "there is strong evidence that Congress intended otherwise").

In light of these findings, Pittston cannot succeed with its legal argument and, thus, fails to meet is burden on a summary judgment motion. The United States and the Trustees have shown that no material fact is in dispute in regard to the issue of severability. Accordingly, summary judgment is awarded to the United States and the Trustees on this issue.

D. Count Three In Civil Action No. 01CV273

The parties agree that the Court should defer ruling on Count Three in Civil Action No. 01CV273, which concerns assignments made after October 1, 1993, until the Supreme Court hands down its opinion in *Barnhart v. Peabody Coal Co.*, No. 01-705. The Supreme Court granted certiorari in January 2002 and argument is expected to be heard this fall. The Court will defer ruling on this issue until the Supreme Court has rendered its ruling on the matter.

E. Count Four In Civil Action No. 01CV273

Count Four in Civil Action No. 01CV273 relates closely to the issue of severability and the Supreme Court's ruling in *Eastern Enterprises*, which effectively invalidated more than one thousand assignments.[36] Pittston states that the Commissioner subsequently re-assigned 95 beneficiaries to Pittston and that the Trustees then retroactively assessed Pittston for health benefit premiums relating to these 95 re-assignments. Pittston believes these re-assignments violate the Coal Act and asks the Court to order a refund of liabilities imposed on

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[36] Specifically, *Eastern Enterprises* invalidated § 9706(a)(3) of the Coal Act as it applied to Eastern. *Eastern Enterprises*, 524 U.S. at 538. The Supreme Court found that § 9706(a)(3) placed a "severe, disproportionate, and extremely retroactive burden on Eastern." *Id.* Eastern had ceased coal mining operations in 1965 and "neither participated in negotiations nor agreed to make contributions in connection with the Benefits Plan under the 1974, 1978, or subsequent NBCWA's." *Id.*, at 530.

Pittston as a result of the *Eastern Enterprises* decision and to void all re-assignments and additional liabilities.

Pittston premises Count Four on 26 U.S.C. § 9852(a), which indicates that, when a provision of the Internal Revenue Code is found to be invalid, "the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." 26 U.S.C. § 9852(a). Pittston further argues that the principles of severability, recognized by this Court in its earlier holding that the Coal Act remains functional despite the invalidity of a particular portion, only buttress its position. Pittston asserts that the re-assignments run counter to the principle that a statute is only severable if the remaining portion is "functionally independent" and the elimination of a portion of the statute leaves the remainder "completely unchanged [in] its basic operation." *Jackson*, 390 U.S. at 586. To allow the re-assignments, Pittston submits, is to enlarge the statute.[37]

However, Pittston's position contradicts the intent of § 9706 and the Coal Act as a whole. Congress, in enacting the statute, clearly established a three-tier system by which the Commissioner of Social Security could assign all eligible beneficiaries to a signatory operator. 26 U.S.C. § 9706. In *Eastern Enterprises*, the Supreme Court simply removed certain companies—specifically, those in the same situation as Eastern—from the equation. It did not invalidate the equation, but rather found that assignments to Eastern under

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[37] Pittston relies on *Davis v. Wallace*, 257 U.S. 478 (1922), to support it position. The *Davis* Court indicated that striking a portion of a statute should not enlarge the reach of the statute. *Id.*, at 484. Furthermore, it stated that, even though a portion of a statute may be found unconstitutional, "[f]or all purposes of construction it is to be regarded as part of the act." *Id.*

the statute violated the Constitution.[38] *See generally Wheeling-Pittsburgh Steel Corp. v. Barnhart*, Civil Action No. 5:99CV60 (N.D. W.Va. March 29, 2002) (interpreting *Eastern Enterprises* as offering "guidance" to the Commissioner of Social Security on making assignments and holding that it was within the Commissioner's power, under § 9706(a) "to reassign beneficiaries in order to comply with the Supreme Court's ruling . . . ."); but *see Sidney Coal Co., Inc. v. Massanari*, Civil Action No. 01-76-DCR (E.D. Ky. July 23, 2002).

The argument that the re-assignments enlarged the statute is incorrect. The Coal Act, from its very language, always envisioned that the beneficiaries would be assigned to signatory operators. Removing Eastern and Eastern-like companies simply reduced the number of signatory operators; it did not expand the reach of the statute in terms of the number of beneficiaries.

Furthermore, this Court agrees with the Eleventh Circuit's reasoning in *Apogee Coal Co., et al. v. Holland, et al.*, No. 98-02858-CV-C-S (11th Cir. July 12, 2002): "[A]lthough the Coal Act does not specifically address changes in assignment resulting from judicial decisions, there is no meaningful basis for treating such corrections differently from other administrative changes in assignments provided in the Act." *Id.*, at 14. The Coal Act's "preferred method" for handling changes in assignments is to repay the premiums incorrectly assigned and recalculate the premium owed by each remaining operator. *Id.*, at 12.

As a result, Pittston cannot succeed with its argument that the re-assignments and the retroactive assessments related to

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[38] Invalid applications of a statute can be "excised" without destroying the function of a statute. *Carnival Cruise Lines v. United States*, 200 F.3d 1361, 1367 (Fed. Cir. 2000).

them are improper. The United States and the Trustees have shown that no material issue of fact is in dispute in regard to re-assignments. The Motions for Summary Judgment filed by the United States and the Trustees on this issue are granted. Pittston's Motion for Summary Judgment is denied.

III.

For the aforementioned reasons, the Court grants summary judgment to the United States and the Trustees on the non-delegation and separation of powers claims, the Fifth Amendment claim, the non-severability claim, and the claim for a refund of assignments. The Court defers ruling on the claim relating to assignments made after October 1, 1993 until the Supreme Court rules on *Barnhart v. Peabody Coal Co.*

An appropriate Order shall issue.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

AUGUST 20, 2002
DATE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed August 5, 2004]

No. 02-2199
CA-97-294-3

THE PITTSTON COMPANY; BUFFALO MINING COMPANY; CLINCHFIELD COAL COMPANY; EASTERN COAL CORPORATION; ELKAY MINING COMPANY; JEWELL RIDGE COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; MEADOW RIVER COAL COMPANY; PITTSTON COAL GROUP; RANGER FUEL CORPORATION

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA
Defendant & Third Party Plaintiff-Appellee

v.

MICHAEL H. HOLLAND, Trustee of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN; ELLIOT A. SEGAL, Trustee of the United Mine Workers of America Combined Benefit Fund; WILLIAM P. HOBGOOD, Trustee of the United Mine Workers of America Combined Benefit Fund; MARTY D. HUDSON, Trustee of the United Mine Workers of America Combined Benefit Fund; THOMAS O. S. RAND, Trustee of the United Mine Workers of America Combined Benefit Fund; GAIL R. WILENSKY, Trustee of the United Mine Workers of America Combined Benefit Fund; CARL E. VAN HORN, Trustee of the United Mine Workers of America Combined Benefit Fund; CARLTON R.

SICKLES, Trustee of the United Mine Workers of America Combined Benefit Fund;

Third Party Defendants-Appellees

and

THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INCORPORATED

Intervenor

and

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

Party in Interest

No. 02-2200
CA-01-273-3
CA-97-294-3

THE PITTSTON COMPANY; BUFFALO MINING COMPANY; CLINCHFIELD COAL COMPANY; EASTERN COAL CORPORATION; ELKAY MINING COMPANY; JEWELL RIDGE COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; MEADOW RIVER COAL COMPANY; PITTSTON COAL GROUP; RANGER FUEL CORPORATION

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA

Defendant & Third Party Plaintiff-Appellee

v.

MICHAEL H. HOLLAND, Trustee of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN; ELLIOT A. SEGAL, Trustee of the United Mine Workers of America Combined Benefit Fund; WILLIAM P. HOBGOOD, Trustee of

the United Mine Workers of America Combined Benefit Fund; MARTY D. HUDSON, Trustee of the United Mine Workers of America Combined Benefit Fund; THOMAS O. S. RAND, Trustee of the United Mine Workers of America Combined Benefit Fund; GAIL R. WILENSKY, Trustee of the United Mine Workers of America Combined Benefit Fund; CARL E. VAN HORN, Trustee of the United Mine Workers of America Combined Benefit Fund; CARLTON R. SICKLES, Trustee of the United Mine Workers of America Combined Benefit Fund;

Third Party Defendants-Appellees

and

THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INCORPORATED

Intervenor

and

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

Party in Interest

No. 03-1351
CA-97-294-3

THE PITTSTON COMPANY; BUFFALO MINING COMPANY; CLINCHFIELD COAL COMPANY; EASTERN COAL CORPORATION; ELKAY MINING COMPANY; JEWELL RIDGE COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; MEADOW RIVER COAL COMPANY; PITTSTON COAL GROUP; RANGER FUEL CORPORATION

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA

Defendant & Third Party Plaintiff-Appellee

v.

MICHAEL H. HOLLAND, Trustee of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN; ELLIOT A. SEGAL, Trustee of the United Mine Workers of America Combined Benefit Fund; WILLIAM P. HOBGOOD, Trustee of the United Mine Workers of America Combined Benefit Fund; MARTY D. HUDSON, Trustee of the United Mine Workers of America Combined Benefit Fund; THOMAS O. S. RAND, Trustee of the United Mine Workers of America Combined Benefit Fund; GAIL R. WILENSKY, Trustee of the United Mine Workers of America Combined Benefit Fund; CARL E. VAN HORN, Trustee of the United Mine Workers of America Combined Benefit Fund; CARLTON R. SICKLES, Trustee of the United Mine Workers of America Combined Benefit Fund

Third Party Defendants-Appellees

and

THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INCORPORATED; INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

Parties in Interest

No. 03-1354
CA-97-294-3
CA-01-273-3

THE PITTSTON COMPANY; BUFFALO MINING COMPANY; CLINCHFIELD COAL COMPANY; EASTERN COAL CORPORATION; ELKAY MINING COMPANY; JEWELL RIDGE COAL CORPORATION; KENTLAND-ELKHORN COAL CORPORATION; MEADOW RIVER COAL COMPANY; PITTSTON COAL GROUP; RANGER FUEL CORPORATION

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA
Defendant & Third Party Plaintiff-Appellee

v.

MICHAEL H. HOLLAND, Trustee of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT PLAN; ELLIOT A. SEGAL, Trustee of the United Mine Workers of America Combined Benefit Fund; WILLIAM P. HOBGOOD, Trustee of the United Mine Workers of America Combined Benefit Fund; MARTY D. HUDSON, Trustee of the United Mine Workers of America Combined Benefit Fund; THOMAS O. S. RAND, Trustee of the United Mine Workers of America Combined Benefit Fund; GAIL R. WILENSKY, Trustee of the United Mine Workers of America Combined Benefit Fund; CARL E. VAN HORN, Trustee of the United Mine Workers of America Combined Benefit Fund; CARLTON R. SICKLES, Trustee of the United Mine Workers of America Combined Benefit Fund

Third Party Defendants-Appellees

and

THE BITUMINOUS COAL OPERATORS' ASSOCIATION, INCORPORATED; INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

Parties in Interest

On Petition for Rehearing and Rehearing En Banc

Appellants filed a petition for rehearing and rehearing en banc.

Chief Judge Wilkins voted to grant panel rehearing. Judges Niemeyer and Traxler voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX D

COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992, 26 U.S.C. §§ 9701-9722, 30 U.S.C § 1232(h)
Subtitle J—Coal Industry Health Benefits
Chapter 99—Coal Industry Health Benefits
Subchapter A—Definitions of General Applicability

§ 9701.[1] Definitions of general applicability.

(a) Plans and funds

For purposes of this chapter—

(1) UMWA Benefit Plan

(A) In general

The term "UMWA Benefit Plan" means a plan—

(i) which is described in section 404(c), or a continuation thereof: and

(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

(B) 1950 UMWA Benefit Plan

The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

(C) 1974 UMWA Benefit Plan

The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan. participation in which is substantially limited to individuals who retired on or after January 1, 1976.

(2) 1950 UMWA Pension Plan

The term "1950 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

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[1] Section numbers editorially supplied.

(3) 1974 UMWA Pension Plan

The term "1974 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

(4) 1992 UMWA Benefit Plan

The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.[2]

(5) Combined Fund

The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

(b) Agreements

For purposes of this section—

(1) Coal wage agreement

The term "coal wage agreement" means—

(A) the National Bituminous Coal Wage Agreement, or

(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan or any predecessor thereof.

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[2] *See* References in Text note below.

(2) Settlors

The term "settlors" means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the "BCOA").

(3) National Bituminous Coal Wage Agreement

The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

(c) Terms relating to operators

For purposes of this section

(1) Signatory operator

The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

(2) Related persons

(A) In general

A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator: or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

(B) Time for determination

The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

(3) 1988 agreement operator

The term "1988 agreement operator" means—

(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

(4) Last signatory operator

The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

(5) Assigned operator

The term "assigned operator" means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

(6) Operators of dependent beneficiaries

For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

(7) Business

For purposes of this chapter, a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

(d) Enactment date

For purposes of this chapter. the term "enactment date" means the date of the enactment of this chapter.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3037.)

REFERENCES IN TEXT

Section 9713A, referred to in subsec. (a)(4), probably should be a reference to section 9712 which provided for the establishment of the United Mine Workers of America 1992 Benefit Plan, referred to in that section as the "1992 UMWA Benefit Plan". No section 9713A of this title has been enacted.

The date of the enactment of this chapter, referred to in subsec. (d), is the date of the enactment of Pub. L. 102-486, which was approved Oct. 24, 1992.

FINDINGS AND DECLARATION OF POLICY

Section 19142 of Pub. L. 102-486 provided that:

"(a) FINDINGS.—The Congress finds that—

"(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

"(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

"(b) STATEMENT OF POLICY.—It is the policy of this subtitle [subtitle C (§§ 19141-19143) of title XIX of Pub. L. 102-486, enacting this subtitle, amending sections 1231 and 1232 of Title 30, Mineral Lands and Mining, and enacting provisions set out as a note under section 1 of this title]—

"(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

"(2) to allow for sufficient operating assets for such plans; and

"(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans."

Subchapter B—Combined Benefit Fund
Part I—Establishment And Benefits

§ 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

(a) Establishment

(1) In general

As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

(2) Merger of retiree benefit plans

As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

(3) Treatment of plan

The Combined Fund shall be—

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

(4) Tax treatment

For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

(b) Board of trustees

(1) In general

For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

(C) two individuals designated by the United Mine Workers of America; and

(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

(2) Successor trustees

Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees.

(3) Special rules

(A) BCOA

If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

(B) Former signatories

The initial trustee under paragraph (1)(B) shall be designated by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest

number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

(c) Plan year

The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

(Added Pub. L. 102-486. title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3040.)

§ 9703. Plan benefits

(a) In general

Each eligible beneficiary of the Combined Fund shall receive—

(1) health benefits described in subsection (b), and

(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

(b) Health benefits

(1) In general

The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Plan payment rates

(A) In general

The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to a uniform level of health benefits; and

(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

(B) Reductions

The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

(ii) by the amount reserved for plan administration under subsection (d).

(C) Increases

The amount determined under subparagraph (A)(ii) shall be increased—

(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

(ii) by any carryover to the plan year from any preceding plan year which—

(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

(II) the trustees elect to use to pay benefits for the current plan year, and

(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

(3) Qualified providers

The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

(4) Effective date

Benefits shall be provided under paragraph (1) on and after February 1, 1993.

(c) Death benefits coverage

(1) In general

The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

(2) Termination of coverage

The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

(d) Reserves for administration

The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

(e) Limitation on enrollment

The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

(f) Eligible beneficiary

For purposes of this subchapter, the term "eligible beneficiary" means an individual who—

(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3041.)

REFERENCES IN TEXT

The Social Security Act, referred to in subsec. (b)(3), is act Aug. 14. 1935. ch. 531. 49 Stat. 620, as amended. Title XVIII of the Act is classified generally to subchapter XVIII (§ 1395 *et seq.*) of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

PART II—FINANCING

§ 9704. Liability of assigned operators

(a) Annual premiums

Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium

For purposes of this chapter—

(1) In general

The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium

The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

(A) the amount determined by dividing—

(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

(3) Adjustments for medicare reductions

If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

(c) Death benefit premium

The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

(d) Unassigned beneficiaries premium

The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

(e) Premium accounts; adjustments

(1) Accounts

The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

(2) Allocations

(A) Administrative expenses

Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

(B) Interest

Interest shall be allocated to the account established for health benefit premiums.

(3) Shortfalls and surpluses

(A) In general

Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

(B) Exception

Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

(i) the excess of the premiums credited to such account for a plan year over the benefits (and administrative

costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

(C) No authority for increased payments

Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703(b)(2).

(f) Applicable percentage

For purposes of this section—

(1) In general

The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

(2) Annual adjustments

In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned

operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

(g) Payment of premiums

(1) In general

The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

(2) Deductibility

Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(h) Information

The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Commissioner of Social Security information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary[1] may require to compute any premium under this section.

(i) Transition rules

(1) 1988 agreement operators

(A) 1st year costs

During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund

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[1] So in original. Probably should be "Commissioner".

incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

(B) Deficits from merged plans

During the period beginning February 1. 1993. and ending September 30. 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

(C) Failure

If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

(D) Premium reductions

(i) 1st year payments

In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1. 1993.

(ii) Deficit payments

In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1. 1993, including claims based on the "evergreen clause" found in the language

of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

(iii) Limitation

Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

(iv) Plan years

Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

(E) Allocations of contributions and refunds

Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

(2) 1st plan year

In the case of the plan year of the Combined Fund beginning February 1, 1993—

(A) the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

(3) Startup costs

The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

(Added Pub. L. 102-486, title XIX. § 19143(a), Oct. 24, 1992. 106 Stat. 3042; amended Pub. L. 103-296, title I, § 108 (h)(9)(A), Aug. 15. 1994, 108 Stat. 1487.)

REFERENCES IN TEXT

The Social Security Act, referred to in subsec. (b)(3), is act Aug. 14. 1935, ch. 531. 49 Stat. 620, as amended. Title XVIII of the Act is classified generally to subchapter XVIII (§ 1395 *et seq.*) of chapter 7 of Title 42. The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

AMENDMENTS

1994-Subsecs. (b)(2). (h). Pub. L. 103-296 substituted "Commissioner of Social Security" for "Secretary of Health and Human Services".

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-296 effective Mar. 31, 1995, see section 110(a) of Pub. L. 103-296, set out as a note under section 401 of Title 42. The Public Health and Welfare.

§ 9705. Transfers

(a) Transfer of assets from 1950 UMWA Pension Plan

(1) In general

From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

(A) $70,000,000 on February 1, 1993,

(B) $70,000,000 on October 1, 1993, and

(C) $70,000,000 on October 1, 1994.

(2) Reservation

Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

(3) Use of funds

Amounts transferred to the Combined Fund under paragraph (1) shall—

(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704 (i)(1)(B).

(4) Tax treatment; validity of transfer

(A) No deduction

No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Bene-

fit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

(B) Other tax provisions

Any transfer pursuant to paragraph (1)—

(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

(5) Treatment of transfer

Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines, or penalties of any kind whatsoever.

(b) Transfers from abandoned mine reclamation fund

(1) In general

The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

(2) Use of funds

Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992. 106 Stat. 3046.)

§ 9706. Assignment of eligible beneficiaries

(a) In general

For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase

For purposes of subsection (a)—

(1) Aggregation rules

(A) Related person

Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

(B) Certain employment disregarded

Employment with—

(i) a person which is (and all related persons with respect to which are) no longer in business, or

(ii) a person during a period during which such person was not a signatory to a coal wage agreement, shall not be taken into account.

(2) Reassignment upon purchase

If a person becomes a successor of an assigned operator after the enactment date. the assigned operator may transfer the assignment of an eligible beneficiary under sub-section (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

(c) Identification of eligible beneficiaries

The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Commissioner of Social Security a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records,

the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

(d) Cooperation by other agencies and persons

(1) Cooperation

The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner of Social Security in providing information which will enable the Commissioner to carry out his responsibilities under this section.

(2) Providing of information

(A) In general

Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Commissioner of Social Security in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Commissioner shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Commissioner, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Commissioner shall be so advised.

(B) Limitation

Any information provided under subparagraph (A) shall be limited to information necessary for the Commissioner to carry out his duties under this section.

(3) Trustees

The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Commissioner in furnishing, or assisting the Commissioner to obtain, any information the Commissioner needs to carry out the Commissioner's responsibilities under this section.

(e) Notice by Commissioner

(1) Notice to Fund

The Commissioner of Social Security shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

(2) Other notice

The Commissioner of Social Security shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

(f) Reconsideration by Commissioner

(1) In general

Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

(2) Review

An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the

assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

(3) Results of review

(A) Error

If the Commissioner of Social Security determines under a review under paragraph (2) that an assignment was in error—

(i) the Commissioner shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

(ii) the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

(B) No error

If the Commissioner of Social Security determines under a review conducted under paragraph (2) that no error occurred, the Commissioner shall notify the assigned operator.

(4) Determinations

Any determination by the Commissioner of Social Security under paragraph (2) or (3) shall be final.

(5) Payment pending review

An assigned operator shall pay the premiums under section 9704 pending review by the Commissioner of Social Security or by a court under this subsection.

(6) Private actions

Nothing in this section shall preclude the right of any person to bring a separate civil action against another person

for responsibility for assigned premiums, notwithstanding any prior decision by the Commissioner.

(g) Confidentiality of information

Any person to which information is provided by the Commissioner of Social Security under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3047; amended Pub. L. 103-296, title I, § 108 (h)(9)(B), Aug. 15, 1994, 108 Stat. 1487.)

AMENDMENTS

1994—Subsecs. (a), (c) to (g). Pub. L. 103-296 substituted "Commissioner of Social Security" for "Secretary of Health and Human Services", "Commissioner" for "Secretary", and "Commissioner's" for "Secretary's", wherever appearing in text.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-296 effective Mar. 31, 1995, see section 110(a) of Pub. L. 103-296, set out as a note under section 401 of Title 42, The Public Health and Welfare.

PART III—ENFORCEMENT

§ 9707. Failure to pay premium

(a) General rule

There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

(b) Amount of penalty

The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

(c) Noncompliance period

For purposes of this section, the term "non-compliance period" means, with respect to any failure to pay any premium or installment thereof, the period—

(1) beginning on the due date for such premium or installment, and

(2) ending on the date of payment of such premium or installment.

(d) Limitations on amount of penalty

(1) In general

No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

(2) Corrections

No penalty shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

(3) Waiver

In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

(e) Liability for penalty

The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

(f) Treatment

For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3050; amended Pub. L. 104-188, title I, § 1704 (t)(65), Aug. 20, 1996, 110 Stat. 1890.)

AMENDMENTS

1996-Subsec. (d)(1). Pub. L. 104-188 struck out comma after "diligence".

PART IV—OTHER PROVISIONS

§ 9708. Effect on pending claims or obligations

All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including

claims or obligations based on the "evergreen" clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3051.)

Subchapter C—Health Benefits of Certain Miners

PART I—INDIVIDUAL EMPLOYER PLANS

§ 9711. Continued obligations of individual employer plans

(a) Coverage of current recipients

The last signatory operator of any individual who, as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individual and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for as long as the last signatory operator (and any related person) remains in business.

(b) Coverage of eligible recipients

(1) In general

The last signatory operator of any individual who, as of February 1, 1993, is not receiving retiree health benefits under the individual employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes

eligible to receive benefits under such plan, provide health benefits coverage to such individual and the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

(2) Coverage

Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1. 1992. Such coverage shall continue for as long as the last signatory operator (and any related person) remains in business.

(c) Joint and several liability of related persons

Each related person of a last signatory operator to which subsection (a) or (b) applies shall be jointly and severally liable with the last signatory operator for the provision of health care coverage described in subsection (a) or (b).

(d) Managed care and cost containment

The last signatory operator shall not be treated as failing to meet the requirements of subsection (a) or (b) if benefits are provided to eligible beneficiaries under managed care and cost containment rules and procedures described in section 9712(c) or agreed to by the last signatory operator and the United Mine Workers of America.

(e) Treatment of noncovered employees

The existence, level, and duration of benefits provided to former employees of a last signatory operator (and their eligible beneficiaries) who are not otherwise covered by this chapter and who are (or were) covered by a coal wage agreement shall only be determined by, and shall be subject to, collective bargaining, lawful unilateral action, or other applicable law.

(f) Eligible beneficiary

For purposes of this section, the term "eligible beneficiary" means any individual who is eligible for health benefits under a plan described in subsection (a) or (b) by reason of the individual's relationship with the retiree described in such subsection (or to an individual who, based on service and employment history at the time of death, would have been so described but for such death).

(g) Rules applicable to this part and part II

For purposes of this part and part II—

(1) Successor

The term "last signatory operator" shall include a successor in interest of such operator.

(2) Reassignment upon purchase

If a person becomes a successor of a last signatory operator after the enactment date, the last signatory operator may transfer any liability of such operator under this chapter with respect to an eligible beneficiary to such successor, and such successor shall be treated as the last signatory operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the last signatory operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. A last signatory operator shall notify the trustees of the 1992 UMWA Benefit Plan of any transfer described in this paragraph.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3051.)

PART II—1992 UMWA BENEFIT PLAN

§ 9712. Establishment and coverage of 1992 UMWA Benefit Plan

(a) Creation of plan

(1) In general

As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

(2) Treatment of plan

The 1992 UMWA Benefit Plan shall be—

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

(b) Coverage requirement

(1) In general

The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

(2) Eligible beneficiary

For purposes of this section, the term "eligible beneficiary" means an individual who—

(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

(B) With respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

(c) Health Benefits

(1) In general

The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 Benefit Plan as of January 1, 1992.

(2) Managed care

The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care

network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

(3) Major elements of rules

Elements described in this paragraph are—

(A) implementing formulary for drugs and subjecting and subjecting the prescription program to a rigorous review of appropriate use,

(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount potential discount varying by geographic region,

(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

(D) utilizing, in the claims payment function "appropriateness of service" protocols under Title XVIII of the Social Security Act if more stringent,

(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

(4) Last signatory operators

The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

(5) Standards of quality

Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the standards of quality adopted by, a medical peer review panel, which has been established—

(A) by the settlors, or

(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

(d) Guarantee of benefits

(1) In general

All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

(2) Adjustments

The 1992 UMWA Benefit Plan shall provide for—

(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

(3) Additional liability

Any last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

(4) Joint and several liability

A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such

operator shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

(5) Deductibility

Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(6) 1988 last signatory operator

For purposes of this section. the term "1988 last signatory operator" means a last signatory operator which is a 1988 agreement operator.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3053.)

REFERENCES IN TEXT

The Social Security Act, referred to in subsec. (c)(3)(C), (D), is act Aug. 14. 1935, ch. 531, 49 Stat. 620, as amended. Title XVIII of the Act is classified generally to subchapter XVIII (§ 1395 *et seq.*) of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

Subchapter D—Other Provisions

§ 9721. Civil enforcement

The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding

sentence, a signatory operator and related persons shall be treated in the same manner as employers.

(Added Pub. L. 102—486, title XIX, § 19143(a), Oct. 24, 1992. 106 Stat. 3055.)

REFERENCES IN TEXT

The Employee Retirement Income Security Act of 1974, referred to in text, is Pub. L. 93-406, Sept. 2. 1974. 88 Stat. 829, as amended. Subtitle E of title IV of the Act is classified generally to subtitle E (§ 1381 *et seq.*), of subchapter III of chapter 18 of Title 29, Labor. Section 4301 of the Act is classified to section 1451 of Title 29. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 29 and Tables.

§ 9722. Sham transactions

If a principal purpose of any transaction is to evade or avoid liability under this chapter, this chapter shall be applied (and such liability shall be imposed) without regard to such transaction.

(Added Pub. L. 102-486, title XIX, § 19143(a), Oct. 24, 1992. 106 Stat. 3056.)

TITLE 30. MINERAL LANDS AND MINING
CHAPTER 25. SURFACE MINING
CONTROL AND RECLAMATION
ABANDONED MINE RECLAMATIONS

§ 1232. Reclamation fee

(h) Transfer of funds to Combined Fund.

(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under *section 9702 of the Internal Revenue Code* of 1986 [26 USCS § 9702] for any fiscal year an amount equal to the sum of—

(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

(B) the amount by which the amount described in subparagraph (A) is less than $ 70,000,000.

(3)(A)The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under *section 9704(e) of the Internal Revenue Code* of 1986 [26 USCS § 9704(e)] for the fiscal year of the Combined Fund in which the transfer is made.

(B) The aggregate amount which may be transferred under paragraph (2)(B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund after September 30, 1992, and before October 1, 1995.

(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year.

APPENDIX E

CRS Report for Congress

November 10, 1993

Congressional Research Service • The Library of Congress

Budget Treatment of the UMWA Retiree Health Benefit Program

Nonna A. Noto
Specialist in Public Finance
Economics Division

SUMMARY

The two United Mine Workers of America (UMWA) retiree health benefit funds created by the Energy Policy Act of 1992 are unique in being private plans included in the Federal budget. The premiums that companies must pay to the funds are treated as revenues of the Federal Government and the expenditures of the funds as Federal outlays. Budget specialists in both the congressional and executive branches concurred in scoring the new UMWA retiree health benefit funds as on-budget.

BACKGROUND ON UMWA RETIREE HEALTH BENEFIT PLANS [1]

The Coal Industry Retiree Health Benefit Act of 1992, part of the Energy Policy Act of 1992 (P.L. 102-486), substan-

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[1] For an in-depth discussion of the issue and the provisions of the Coal Industry Retiree Health Benefit Act of 1992, see U.S. Congress. House. Committee on Ways and Means. *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits*. Committee Print, 103d Cong., 1st Sess., WMCP 103-19, Sept. 3, 1993. Washington, U.S. Govt. Print. Off., 1993.

tially changed the financing of retiree health benefits for certain mine workers.

The law was enacted in response to concerns that the health care benefits promised to retired UMWA miners and their dependents were at risk of being reduced or discontinued. The coal companies that remained signatory to the NBCWA, the bargaining agreement between the UMWA and the Bituminous Coal Operators' Association, were objecting to having to bear the full cost of "orphan retirees." The term "orphan retirees" referred to the retired coal industry workers (and their eligible dependents) whose former employers were no longer contributing to the existing retiree health plans. Some former employers were out of business entirely. Others, however, were still in business but were no longer signatory to the NBCWA and, in some cases, were no longer in the coal business.

The Federal legislation preempted health benefit arrangements established by private collective bargaining agreements. The Act replaced the United Mine Workers of America (UMWA) 1950 and 1974 Benefit Funds with two new funds, the UMWA Combined Benefit Fund (Combined Fund) and the 1992 UMWA Benefit Plan (1992 Plan).

Previously, retiree health benefits had been paid for by coal companies signatory to the National Bituminous Coal Wage Agreement (NBCWA) based on the number of coal production hours worked by their active employees. The new law requires former employers to make per-person payments to the Combined Fund on behalf of specific beneficiaries "assigned" to them by the U.S. Secretary of Health and Human Services (HHS). The premium payments are set at a flat dollar amount per person, per year, to be paid in monthly installments. The amount of the premium is established each year by the Secretary of HHS, based on actual expenses of the UMWA 1950 and 1974 Funds during their 1992 fiscal year, indexed by the increase in the medical component of the

consumer price index since 1992. Signatories to the 1988 NBCWA agreement are responsible for financing the 1992 Plan and for paying off the deficits of the closed UMWA plans.

The law expands the universe of companies responsible for making contributions beyond those that signed the 1978 NBCWA or later bargaining agreements. Under the so-called super-reachback provisions of the 1992 law, any company (or related person thereto) that ever signed a coal wage agreement, dating back to 1950, could be held responsible as a "last signatory employer."

To help cover the costs of the remaining "unassigned beneficiaries," the law provides for a transfer of $70 million per year into the UMWA Combined Benefit Fund. The first three transfers come from the surplus assets of the UMWA 1950 Pension Fund. Subsequent transfers will come from the interest earnings of the Abandoned Mine Reclamation Fund (also known as the AML, or Abandoned Mine Land, Fund), a Federal fund financed by per ton levies on coal.

The new law guarantees lifetime health benefits for UMWA miners who retire by September 30, 1994. The lifetime guarantee applies to the health benefits paid directly by individual coal companies (for more recent retirees), as well as benefits provided through the UMWA plans. No provisions were made for those who will retire after September 1994; future retirees' health benefits will be determined by future bargaining agreements.

The law specifies that beneficiaries of the Combined Fund be enrolled in a health care services plan which undertakes to provide such benefits on a prepaid risk basis.[2] The law also provides that coverage under the managed care system shall

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[2] A prepaid plan resembles the model of a health maintenance organization (HMO).

to the maximum extent feasible be substantially the same as that available under the previous UMWA plans.[3] The 1992 Plan is not required to use a prepaid services plan but is required to develop managed care and cost containment rules for the payment of benefits. Current signatory employers who pay benefits directly are required to continue providing substantially the same benefits as previously, but may adopt any of the cost containment features specified for the 1992 Plan.

FEDERAL BUDGETARY TREATMENT OF THE UMWA PLANS

During congressional consideration of the Energy Policy Act of 1992 (H.R. 776), the Congressional Budget Office (CBO) and the Joint Committee on Taxation (JCT) were responsible for estimating the budgetary consequences of the Coal Industry Retiree Health Benefit Act, the so-called "coal-related provisions."

As shown in table 1, the expenditures for the retiree health benefits for coal miners were treated as outlays. The extension of the abandoned mine reclamation fee (from its scheduled expiration on September 30, 1995, until September 30, 2004) was counted as miscellaneous governmental receipts[4] Also counted as miscellaneous Federal governmental receipts were 1) the premiums collected from "assigned" coal industry employers to pay for current-year health benefits; 2) the premiums collected from the 1988 signatories to pay off over fiscal years 1993 and 1994 the remaining deficits of the UMWA 1950 and 1974 health benefit funds; and 3) the $70 million per year transfers from the surplus assets of

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[3] The vast majority of the beneficiaries of the Combined Fund are age 65 or over and qualify for Medicare. Thus, the UMWA coverage is largely a Medicare supplemental program which includes prescription drugs.

[4] The fees are estimated net of the corporate tax offset which is typically assumed to be 25 percent of the fees collected.

the UMWA 1950 Pension Fund for the three fiscal years, 1993-95.

The future transfers of up to $70 million per year from the interest earnings of the Abandoned Mine Reclamation Fund, beginning in fiscal year 1996, are considered an "intrabudgetary transfer" within the Federal budget and do not generate any net budgetary effect. The indirect tax effects reflect the increase in corporate tax receipts expected because, as a group, firms in the coal industry are expected to have lower retiree health costs than they would have without the new law; this is attributable, in large part, to the transfers from the UMWA pension fund and the AML Fund.

Because of the extension of the AML fee and the indirect tax effects, the coal-related provisions of the Energy Policy Act are net revenue-raisers, particularly for fiscal years 1996 and beyond. In isolation, the budgets of the UMWA health benefit funds are expected to be in balance each year.

Table 1. Budget Scoring of the Coal-Related Provisions of the Energy Policy Act of 1992 (H.R. 776)
(Millions of dollars)

Provision	Budget classification	Fiscal year 1993	1994	1995	1996	1997
Retiree health benefits for coal miners	outlays	-218	-300	-250	-243	-236
Funding of the UMWA Benefit Funds						
Per-beneficiary premiums	Miscellaneous governmental receipts	105	187	180	173	166
Premiums to cover deficits from the 1950 and 1974 health benefit funds	misc. govt. receipts	43	43	--	--	--
Transfers from UMWA pension fund	misc. govt. receipts	70	70	70	--	--

Transfers from Abandoned Mine Reclamation Fund	intrabudgetary transfer	--	--	--	a	a

Revenues allocated to the AML Fund and the General Treasury

Abandoned mine reclamation fee extension[b]	misc. govt. receipts	--	--	--	195	197
Indirect tax effects[c]	corporate tax receipts	2	7	18	25	31

[a] For fiscal years 1996 and beyond, this includes $70 million per year in transfers of interest income from the AML Fund. These are considered intrabudgetary transfers, which do not result in any net budget effect.

[b] These are the revenues expected from the extension of the abandoned mine reclamation fees, net of the corporate income tax offset. The gross AML fee collections will go to the Abandoned Mine Reclamation Fund, not the UMWA Combined Fund.

[c] The indirect tax effects will be corporate tax receipts for the general treasury and not income to the UMWA Combined Fund.

Source of provisions and dollar estimates: U.S. Congress. Joint Committee on Taxation. *Estimated Budget Effects of Conference Agreement for Revenue-Related Provisions of H.R. 776*. Preliminary. JCX-37-92, October 5, 1992. The indirect tax effects were estimated by the Joint Committee on Taxation; other revenues and outlays were estimated by the Congressional Budget Office. Budget classification added by CRS based on information from the CBO and the JCT.

The Office of Management and Budget (OMB) reached a conclusion similar to the CBO and the JCT about the budgetary treatment of the UMWA plans when it scored the Energy Policy Act at the time of its enactment in October

1992. The U.S. budget for fiscal year 1994 also includes the outlays and revenues of the UMWA Combined Benefit Fund and the 1992 UMWA Benefit Plan as "on-budget." The outlays can be found in the section on "Other Independent Agencies" where the UMWA funds are classified as trust funds.[5] The revenues of the Combined Fund (from the premiums and the transfer from the UMWA pension fund) are included in Federal miscellaneous receipts.[6]

Generated at a later date than the congressional estimates, the FY94 budget estimates outlays for FY 1994 at $291.5 million for the UMWA Combined Fund and $0.5 million for the 1992 Plan, for a total of $292 million.[7] The budget also estimates receipts for the UMWA Combined Benefit Fund equal to $292 million.[8] The backup tables[9] for the budget show this to be made up of $222 million in premiums and $70 million in transfers from the UMWA Pension Fund.

Because of the projected balance between revenues and outlays, the UMWA programs are expected to be deficit-neutral with respect to the Federal budget. They are not, however, budget-neutral: they add an equal amount to both revenues and outlays, increasing the FY94 Federal budget by $292 million.

Payments for retiree health benefits made directly by signatory coal companies from their individual company plans are not included in the Federal budget even though those payments are now mandated under the Energy Policy Act. While

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[5] U.S. Executive Office of the President. Office of Management and Budget. *Budget of the United States Government for Fiscal Year 1994.* Washington, U.S. Govt. Print. Off., April 8, 1993. Appendix, p. 1153.

[6] *FY 1994 Budget*, p. 15.

[7] *FY94 Budget*, appendix p. 1153.

[8] *FY94 Budget*, p. 15.

[9] OMB's Receipt Reports for the FY94 Budget, OMBBR84Y.

in concept it might be desirable and consistent to include them, in practice it is difficult for the Government to measure payments not funneled through a trust fund or other identifiable accounting entity.

PRINCIPLES OF BUDGET CLASSIFICATION

Budget specialists in both the congressional and executive branches concurred in scoring the UMWA retiree health benefit funds as being on-budget. The new UMWA funds are described in the statute as private, multiemployer benefit plans.[10] The fact that the collection and spending agent is a private rather than a Governmental entity was not a sufficient reason to consider the program nongovernmental. The substance of both the revenue and outlay side of the retiree health benefit program is laid out by Federal statute. Federal law both requires payment and allocates the use of the money.

The premium payments into the new UMWA funds are classified as governmental receipts, not offsetting collections. This follows the recommendations of the President's Commission on Budget Concepts. In its October 1967 report, the Commission recommended classifying those social insurance collections arising from the Government's sovereign powers as budget receipts and those arising from noncompulsory insurance activities as offsetting collections.[11] In the case of the newly created UMWA health benefit funds, payment of the premiums was mandated through the Government's sovereign powers; payment is compulsory for those companies assigned responsibility for a beneficiary.

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[10] *See* section 19142 of the Energy Policy Act of 1992, concerning findings and declaration of policy; section 9702 of the Internal Revenue Code of 1986, as amended (IRC), concerning establishment of the UMWA Combined Benefit Fund; and IRC section 9712 concerning establishment of the 1992 UMWA Benefit Plan.

[11] Cited in U.S. Congressional Budget Office. *The Growth of Federal User Charges*. Washington, August 1993. p. 33.

APPENDIX F

UMWA COMBINED BENEFIT FUND
TRUST DOCUMENT

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UMWA COMBINED BENEFIT FUND
TRUST DOCUMENT

ARTICLE I. (Introduction)

This AGREEMENT is made and entered into by the Board of Trustees of the United Mine Workers of America Combined Benefit Fund, the members of which have been appointed pursuant to the provisions of section 9702(b) of the IRC, and shall be binding on any successor Trustees.

ARTICLE II. (Definitions)

The following terms shall have the meanings hereinafter set forth:

(1) "Act" means the Coal Industry Retiree Health Benefit Act of 1992, codified in relevant part at Sections 9701 et sec. of the IRC.

(2) "Appointing Party" means any of the three entities (or groups of entities) with the authority to appoint Union or Employer Trustees pursuant to Article III.

(3) "Assigned Operator," "1988 Agreement Operator," and "Related Person" shall have the meanings assigned, respectively, to such terms under the Act.

(4) "BCOA" means the Bituminous Coal Operators' Association, Inc. For purposes of the appointment or removal of a Trustee under this Trust, if the BCOA ceases to exist, then the three employers who were members of the BCOA on October 24, 1992 and who have been assigned the greatest number of eligible beneficiaries under section 9706 of the IRC shall have all the rights and obligations of the BCOA.

(5) "Eligible Beneficiary" means an individual who—

(a) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the United Mine Workers of America 1950 Benefit Plan and Trust or the United Mine Workers of America 1974 Benefit Plan and Trust, or

(b) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

(6) "Fund" means the United Mine Workers of America Combined Benefit Fund.

(7) "ERISA" means the employee Retirement Income Security Act of 1974, as amended.

(8) "IRC" means the Internal Revenue Code of 1986, as amended by the Act.

(9) "Plan" means the plan of benefits established and periodically modified by the Trustees, pursuant to section 9703 of the IRC and the provisions of this Agreement and Declaration of Trust.

(10) "Plan Year" means the year ending September 30.

(11) "LMRA" means the Labor Management Relations Act of 1947, as amended.

(12) "Trustees" means the Trustees of this Trust designated in accordance with the provisions of section 9703(b) of the IRC, who shall be the named fiduciaries and the Plan Administrator, as those terms are defined in ERISA.

(13) "Trust" means the Agreement and Declaration of Trust established hereunder.

(14) "UMWA" or "Union" means the United Mine Workers of America.

ARTICLE III. (Administration)

The Trust shall be Administered by a Board of seven Trustees. Two Trustees shall be appointed by the Union, and shall be referred to herein as the "Union Trustees." One Trustee shall be appointed by BCOA, and one Trustee shall be appointed by the three employers, other than 1988 Agreement Operators, that have been assigned the greatest number of eligible beneficiaries under section 9706 of the

IRC. These two Trustees shall be referred to herein as the "Employer Trustees." Prior to November 1, 1993, the Employer Trustee that is not appointed by BCOA may be appointed by the three employers designated pursuant to section 9702(b) (3) (B) of the IRC. The Union Trustees and the Employer Trustees shall appoint three additional Trustees, who shall be referred to herein as the "Neutral Trustees." Any party or parties that have the power to appoint a Trustee may remove that Trustee, at any time and for any reason. In the event of resignation, death, removal, inability or unwillingness to serve of a Trustee, the party who appointed that Trustee shall appoint a successor.

The Trustees so designated shall constitute the Board of Trustees to administer the Plan and Trust, as they may be amended from time to time. The Trustees shall select from among themselves a Chairman and such other officers as they deem necessary, and may change them as they deem appropriate. The Trustees shall also determine the functions and duties of such officers.

For purposes of taking any action and any other aspect of administration under the Plan or Trust, a quorum shall consist of two Union Trustees, two Employer Trustees and two Neutral Trustees; provided, however, that:

(1) a quorum shall not be deemed to exist unless all Trustees have received reasonable notice of the meeting at which any action is taken, unless such notice is waived;

(2) a vacancy in the position of one Employer Trustee and/or one Union Trustee shall not prevent the quorum requirement from being met, if either side with a vacancy is represented by its remaining Trustee;

(3) a vacancy in the position of two Neutral Trustees shall not prevent the quorum requirement from being met, if the remaining Neutral Trustee is present;

(4) a quorum may be met if only one Employer Trustee is present, if that Employer Trustee holds the proxy of the other Employer Trustee, if only one Union Trustee is present, if that Union Trustee holds the proxy of the other Union Trustee, or if only one Neutral Trustee is present, if that Neutral Trustee holds the proxy of another Neutral Trustee; and,

(5) at a meeting for the purpose of appointing, removing or reappointing a Neutral Trustee or Trustees, a quorum shall consist of the two Union Trustees and the two Employer Trustees.

In order that these quorum provisions may not be used in any manner to thwart the business of the Trust, notwithstanding the foregoing, if any Employer Trustee, any Union Trustee or any two Neutral Trustees are absent for three consecutive meetings at which the quorum requirement is not met due to such absence, at the third such meeting (and at each subsequent duly noticed meeting until sufficient Trustees attend to constitute a quorum without regard to this paragraph), a quorum shall exist without regard to whether a proxy has been granted by any Trustee.

Any Trustee may call a meeting of the Trustees. The Trustees need not be physically present to constitute a quorum, but may conduct business telephonically or through similar modes of simultaneous communication, and any Trustee shall have the right to be present and to vote telephonically or by similar mode of simultaneous communication. Alternatively, the Trustees may act without meeting, by written resolution signed by all Trustees.

In the event that a meeting is held or action is taken without the participation of two Union Trustees, two Employer Trustees and three Neutral Trustees, each Trustee who attends such meeting shall be entitled to cast his or her own vote and

the vote of any absent Trustee provided that the Trustee has the written proxy of the absent Trustee.

Each Neutral Trustee shall serve for a 24-month term, unless previously removed, beginning on May 1, 1993. At the expiration of each Neutral Trustee's term, a vote of a majority of the Union Trustees and the Employer Trustees shall be necessary to extend the term or reappoint any such Neutral Trustee. The Union Trustees and the Employer Trustees may, by majority vote, remove or reappoint any Neutral Trustee, but no appointment may be for a term exceeding 24 months or, in the case of an appointment to fill a vacancy created by the resignation or removal of a Neutral Trustee, for a term exceeding the remaining term of the Trustee that is being replaced.

In the event of a deadlock on the designation or reappointment of a Neutral Trustee, an impartial umpire (who is not then serving in any other capacity with respect to the Fund) shall be selected by majority vote of the Union and Employer Trustees or, in the absence of a majority vote, by petition by any of the Union and Employer Trustees or by an Appointing Party to the United States District Court for the District of Columbia for the appointment of such impartial umpire, as provided is section 302(c) of the Labor-Management Relations Act of 1947. The impartial umpire shall select a person to be appointed to fill the vacancy of the Neutral Trustee. In making such selection, the impartial umpire shall exercise the appropriate care, skill and prudence and shall not be limited in his or her selection to persons proposed by the Union or Employer Trustees. Furthermore, the impartial umpire shall attempt to select a person with experience in the management of employee benefits, the delivery of retiree health benefits, or labor relations or related fields.

ARTICLE IV. (Creation)

The Trust established hereby is an irrevocable trust created pursuant to section 9702 of the Coal Industry Retiree Health Benefit Act of 1992 and is a plan described in section 302(c) of the Labor-Management Relations Act of 1947, an employer welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974, and a multiemployer plan within the meaning of 3(37) of ERISA which shall endure as long as the purposes for its creation shall exist. The Trust is an organization exempt from tax under section 501(a) of the IRC. The Trust consists of such sums of money and other property, acceptable to the Trustees, as from time to time shall be contributed to, held by, or paid or delivered to the Trustees and such earnings, profits, and increments thereon as may occur from time to time. All such money and other property due and owing or delivered to the Trustees and all investments and reinvestments made therewith or proceeds thereof and all earrings and profits thereon, less the payments which at the time of reference shall have been made by the Trustees as authorized herein, are referred to herein as the "assets of the Trust." The assets of the Trust shall be held by the Trustees and dealt with in accordance with the express provisions of this instrument and the requirements of law.

The monies to be paid into the Trust shall not in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties to this Agreement or of any Assigned Operator, Related Person or Eligible Beneficiary.

ARTICLE. V. (Trustee Responsibilities)

The Trustees, or such other persons as may be property designated pursuant to Article XI hereof, are directed and authorized (a) to hold, to invest and to reinvest the assets of the Trust as provided herein; (b) to pay monies from the Trust in accordance with the terms of the Plan for the purpose of distributing the benefits payable under the Plan; and (c) to

pay the cost of administration of the Trust as hereinafter provided.

Subject to the provisions of the Coal Industry Retiree Health Benefit Act of 1992, this Trust and the Plan, the Trustees shall have full and exclusive authority and discretion to determine all questions of coverage and eligibility (not determined by the Secretary of Health and Human Services), including all factual determinations, investment of trust funds, delivery of benefits, and all other related matters. They shall have full discretionary power to construe the provisions of this Agreement and Declaration of Trust and the Plan.

The Trustees shall comply with all obligations imposed upon them by the Act, and shall do all acts within their power to assist the Secretary of Health and Human Services in carrying out the functions assigned to the Secretary by the Act.

The Trustees are empowered to promulgate such reasonable rules and regulations as they determine to be desirable for carrying out the purposes of this Trust and of the Plan. Such rules and regulations shall be reduced to writing. In addition to any other powers granted to the Trustees, the Trustees are empowered to do all acts which they deem necessary or proper and to exercise any and all powers of the Trustees under this instrument under such terms and conditions as they may deem to be for the best interest of the Trust.

ARTICLE VI. (Delivery of Benefits)

Subject to the requirements of section 9703 of the IRC, including the limitations on permissible expenditures for benefits contained therein, the Trustees shall design a plan of health benefits which shall include managed care, and which shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the UMWA 1950 and 1974 Benefit Plans and

Trusts as of January 1, 1992. In the event that the Trust exceeds the limit on expenditures set forth in section 9703 of the IRC for any plan year, to limit on expenditures otherwise applicable for the succeeding plan year shall be reduced by the amount of such excess and the Trustees shall take whatever steps are necessary, including the modification or reduction of health benefits, to comply with the reduced limit on expenditures.

In order to avoid a modification or reduction in benefits, the Trustees shall, to the maximum extent feasible, and consistent with the provisions of sections 9703 and 9704 of the Act, elect to use carryover surplus amounts in the health benefit premium account or the unassigned beneficiaries premium account to pay benefits in any current plan year when needed to keep expenditures within the limit under section 9703. Any funds received and lawfully retained by the Trust from any other source, including but not limited to income from Trust assets, may be used by the Trustees as they deem appropriate, including but not limited to the establishment of a reserve for the payment of health benefits or administrative expenses. In the event that the Trustees shall elect to make such amounts available for payments of benefits, they shall be treated in any plan year as carryover surplus funds available to increase the expenditure limits of section 9703 of the Act.

The Trustees shall provide for the delivery of health benefits under contracts with insurers, providers or provider groups. health maintenance organizations, preferred provider organizations, or other appropriate entities, pursuant to which coverage for benefits is prepaid by the Trust and the risk of loss is borne by the party or parties contracting with the Trust, and not by the Trust itself. In addition to the foregoing, the Trustees may provide benefits by direct payments for services or through the Combined Fund's own entities, such as, but not Limited to, health maintenance organizations or preferred

provider arrangements where the Trustees determine that such contracts or other arrangements are either more advantageous or in instances where it is not feasible to provide benefits through other means.

The Trustees shall provide the death benefits coverage required under section 9703 (c) of the IRC. Death benefits shall be paid out of the general assets of the death benefit premium account of the Trust.

ARTICLE VII. (Control of Assets)

The Trustees, or other persons as may be properly designated pursuant to Article XI hereof, shall have full discretionary powers of management and control, of sale and resale, in fee simple or otherwise, mortgage, lease, and pledge, of the assets of the Trust, and shall not be restricted to investments in securities or property of the character now or hereafter authorized by law or rules of the United States District Court for the District of Columbia; provided; however, that all such investments shall be made in a manner consistent with the needs and purposes of the Plan. To the extent permitted by ERISA, the Trustees are authorized to invest assets of the Trust in deposits described in Section 408 (b) (4) of ERISA, and in common or collective trust funds or pooled investment funds, including but not limited to those described in Section 408 (b) (8) of ERISA. The assets of the Trust shall be invested and reinvested, without distinction between principal and income, in securities and other forms of property, including but not limited to, corporate stocks (common and preferred), debentures, bonds, and other obligations whether or not secured. The Trustees, or such other persons as may be properly designated pursuant to Article XI hereof, shall not be limited as to the amount or type of any investment in relation to the amount or type of investments constituting the Trust as a whole, subject to applicable legal requirements, and the needs and purposes of the Plan.

The Trustees, or any duly appointed investment managers, as defined in section 3 (38) of ERISA, properly designated, may, in their discretion, keep such portion of the assets of the Trust in cash or cash balances as the Trustees may determine to be reasonably necessary to satisfy the current needs of the Trust.

ARTICLE VIII. (Asset Management)

Neither by way of limitation nor in derogation, but in amplification of any powers granted herein, provided, however, that all such powers are exercised in a manner consistent with the needs and purposes of the Trust, the Trustees, or such other persons as may be properly designated pursuant to Article XI hereof, are further authorized:

(1) To pursue and accept all amounts required to be paid to the Trust pursuant to the Act, including amounts required to be paid from the UMWA 1950 Pension plan and from the Abandoned Mine Reclamation Fund;

(2) To purchase, sell, exchange, convey, transfer or dispose of, and also grant options with respect to, any property, at any time held by them and to make any sale, private or public;

(3) To compromise, compound and settle any debt or obligation due from third persons to them or to third persons from them, as Trustees hereunder, and to reduce the rate of interest on, to extend or otherwise modify, or to foreclose upon default or otherwise enforce, any such obligations;

(4) To vote in person or by proxy and to give general or special proxies or powers of attorney, with or without power of substitution, on any securities or other investments held by them;

(5) To exercise any rights or options appurtenant to any securities or other property held by them for the conversion thereof into other securities or property, or to exercise any

rights or options held by them to subscribe for or purchase additional securities or other property, and to make any and all necessary payments with respect to any such conversion or exercise;

(6) To join in, dissent from or oppose, the reorganization, recapitalization, consolidation, sale or merger of corporations or properties of which they may hold stocks, bonds or other securities or in which they may be interested, upon such terms and conditions as they may deem prudent; to pay any expenses, assessments or subscriptions in connection therewith and to accept any securities or property (whether or not the Trustees would be authorized to then invest in such securities or property) which may be issued upon any such reorganization, recapitalization, consolidation, sale or merger, and thereafter to hold the same;

(7) To make, execute, acknowledge and deliver any and all instruments and other documents that may be necessary or appropriate to carry out the powers herein granted;

(8) To enforce any right, obligation or claim in their absolute discretion and in general to protect is any way the interest of the Trust, either before or after default with respect to any such right, obligation or claim, and, in case they shall consider such action for the best interests of the Trust, in their absolute discretion to abstain from the enforcement of any right, obligation or claim and to abandon any property which at any time may be held by them;

(9) To borrow or raise money for the purpose of the Trust in such amount and upon such terms and conditions as in their absolute discretion they may deem advisable; and for any sums so borrowed to issue their promissory note as Trustees and to secure the repayment thereof by mortgaging or pledging all or any part of the Trust. No person lending money to the Trustees shall be bound to see to the application

of the money loaned or to inquire into the validity, expediency or propriety of any such borrowing;

(10) To employ or otherwise retain suitable agents, employees, consultants, and outside counsel or co-counsel from time to time, and to pay them reasonable expenses, compensation and fees;

(11) To retain without liability for depreciation any securities or property at any time purchased and/or received by the Trustees as a part of the Trust;

(12) To do all acts which may be necessary to comply with any of the requirements of the Coal Industry Retiree Health Benefit Act of 1992, ERISA or any other federal law;

(13) To enter into any and all contracts and agreements for carrying out the terms of the Plan and the Trust and for the best interest of the Trust;

(14) The Trustees may, in their sole discretion, cause the securities which from time to time may comprise the Trust, to be registered in their name as Trustees hereunder, or in the name of their nominee without disclosing the ownership thereof or to take and keep the same unregistered, and to retain them, or any part thereof, in such conditions that they will pass by delivery.

Notwithstanding the above authority granted the Trustees hereunder, no power shall be exercisable in any manner which violates the requirements of the Act, ERISA or any other applicable law, governmental rule or regulation, or which is inconsistent with the needs and purposes of the Trust.

ARTICLE IX. (Trustee Compensation and Payment of Expenses)

In accordance with the provisions of Section 408 (b) (2) of ERISA, the Trustees shall be paid reasonable compensation for the performance of their fiduciary duties in the admini-

stration of the Trust. In addition, subject to the Trustees' statement of policy on the payment and reimbursement of expenses, the Trust shall pay for and/or reimburse the Trustees for the reasonable amount of all necessary expenses that are properly and actually Incurred.

ARTICLE X. (Trustee Liability)

A Trustee shall not be liable for the making, retention or sale of any investment or reinvestment made by him or her as herein provided; for any loss to or diminution of the Trust or for anything done or omitted under this instrument, except for his own willful misconduct or lack of good faith, or any other action or omission for which personal liability is imposed under Part 4 of Subtitle B of Title I of ERISA.

Any Trustee, at that Trustee's own expense, may consult with legal counsel concerning any questions which may arise with reference to his duties under this instrument, and except as otherwise provided by law, the opinion of such counsel shall be full and complete protection in respect to any action taken or suffered by such Trustee hereunder in good faith and in accordance with the opinion of such counsel.

When and if a monetary claim or suit is lodged against one or more fiduciaries of the Trust, including the Trustees thereof, in their individual capacities, arising out of their action as fiduciaries, the Trust may engage and compensate counsel to represent such fiduciary until a final court decision, or a final government agency decision if no court appeal is filed, finds that such fiduciary in his individual capacity (1) has breached his fiduciary obligations under ERISA; (2) by so doing has caused a loss to the Trust or its corresponding Plan or has gained by use of Trust assets; and (3) is therefore liable in his individual capacity for damages or to return any profit occasioned by such breach to the complaining person, persons, entity or entities.

If the Trust expends moneys for counsel under the preceding paragraph, and the individual liability described therein is so finally determined against one or more fiduciaries, each individual found so liable shall reimburse the Trust for moneys so expended for his counsel, to the extent permitted by ERISA.

No provision in this Article shall be construed in a manner violative of the provisions of Section 410 of ERISA.

The Trustees shall purchase fiduciary insurance, which shall be paid for by the Trust to the extent permitted by law.

ARTICLE XI. (Recordkeeping, Reporting, Delegation)

The Trustees, or such other persons as may be properly designated pursuant to this Article, shall keep accurate and detailed accounts of all investments, receipts, and disbursements and other transactions hereunder, and such accounts, books and records relating thereto shall be open to inspection and audit by party or parties with the power to appoint a Trustee at all reasonable times at the offices of the Trust. The Trustees or other such persons as may be properly designated pursuant to Article XI hereof, shall be responsible for providing Eligible Beneficiaries under the Plan with all information required to be furnished pursuant to the provisions of ERISA or the regulations promulgated thereunder.

The Trustees, or such other persons as may be properly designated pursuant to this Article, shall be responsible for maintaining records sufficient to comply with any requirements of ERISA and for the filing of all reports with the Labor Department and Treasury Department which may be required by any provision of ERISA or the regulations issued thereunder, including the plan description and reports specified by Section 101 (b). A copy of each document or report provided to Eligible Beneficiaries or filed pursuant to the requirements of ERISA or any other applicable law, governmental rule or regulation shall be sent to each party with the

power to appoint a Trustee unless the right to receive such copy has been waived in writing. The Trustees shall provide any Appointing Party or Parties with such other information and/or documentation as such party or parties may reasonably request within a reasonable time from when such request shall be made.

Ninety days following the closing of the Plan Year, the Trustees shall file with the Appointing Parties a written report setting forth in such form and detail as they may request, the transactions effected by the Trustees during the period from the close of the period covered in the previous report. The reports shall be supplemented by the annual report of an independent certified public accountant and by the report required by Section 103 of ERISA.

Upon the expiration of ninety (90) days from the date of any report to the Appointing Parties, the Trustees shall be forever released and discharged from any liability or accountability to anyone as respects the propriety of their acts or transactions shown in the aforementioned report except as otherwise provided by law or with respect to any acts or transactions as to which an Appointing Party or Parties shall file written objections with the Trustees within such period of ninety (90) days.

Any Appointing Party, at its expense, may audit the account, books and records, and operation of the Plan and Trust, at any time and for any reason, upon reasonable notice to the Trustees. The Trustees shall cooperate fully in connection with any such audit and shall make available appropriate personnel and records deemed necessary by the auditors for inspection and copying at reasonable times and places.

The Trustees are hereby authorized to allocate or delegate fiduciary responsibilities in any manner permitted under ERISA, including Section 405 (c) (1). The Trustees may appoint an investment manager or managers to manage any

investments held under this instrument as permitted by Section 402 (c) of ERISA.

ARTICLE XII. (Liability of Assigned Operators and Related Persons)

(l) Each Assigned Operator, 1988 Agreement Operator, and Related Person shall pay to the Trustees the premiums, including contributions, required of it under section 9704 of the IRC.

(2) In the event that an Assigned Operator, 1988 Agreement Operator or Related Person fails to comply with any premium or contribution requirement hereunder, interest (calculated at a rate established by the Trustees at the beginning of each calendar year) shall accrue from the date due until the date on which an amount owed is paid. In addition, the Assigned Operator, 1988 Agreement Operator or Related Person shall be assessed liquidated damages in an amount equal to the greater of twenty percent (20%) of the amount owed or the amount of interest charged. The Trustees shall cooperate with the Secretary of Treasury in the enforcement of the deductibility provision of section 9704 (i) (1) (c) and the penalty provisions of Section 9707 of the Act.

(3) The Trustees are empowered to collect all amounts owed through any means they so choose. All reasonable expenses incurred by the Trustees in enforcing the financing requirements of this Article, including, but not limited to, reasonable attorney's fees, accountants' fees, and court costs, with interest, shall be added to the obligation of the Assigned Operator, 1988 Agreement Operator or Related Person.

(4) Any person that is a Related Person with respect to an Assigned Operator shall be treated as such Operator and shall be jointly and severally liable with such Operator for any obligation imposed under this Article.

(5) Trustees shall establish and maintain the premium accounts required by section 9704 (e) of the Act and they shall increase and reduce premiums when they are required to do so by the occurrence of shortfalls and surpluses in those accounts in accordance with section 9704 (e) (3). The Trustees shall also monitor the level of benefits under Title XVIII of the Social Security Act, and they shall, after consultation with the Secretary, increase the per beneficiary premium for any appropriate plan years when such benefit levels are reduced, pursuant to section 9704 (b) (3) of the Act.

(6) Upon receiving notice from the Secretary of the Secretary's calculation of per beneficiary premiums pursuant to section 9704 of the Act and of the Secretary's assignment of beneficiaries to assigned operators pursuant to section 9706 of the Act, the Trustees shall calculate the "applicable percentage" within the meaning of section 9704 (f) of the Act for each assigned operator and the health benefit premium, death benefit premium, and unassigned beneficiaries premium owed by each assigned operator for the appropriate plan year. The Trustees shall notify each assigned operator of that operator's applicable percentage and of the premiums owed by the operator.

(7) Upon receiving notice from the Secretary of the per beneficiary premium for the first plan year, the Trustees shall calculate the amount necessary for benefits and administrative costs during such year taking into account the 67% rule of section 9704 (i) (2) (A) of the Act and the transfer of funds from the UMWA 1950 Pension Trust to occur on February 1, 1993 pursuant to section 9705 of the Act. The Trustees shall calculate the amount of contributions due from the 1988 Agreement Operators remaining in business on February 1, 1993, pursuant to section 9704 of the Act to pay the cost of first year operations of the Trust, based ratably on those operators' contributions to the UMWA 1950 and 1974 Benefit Plans and Trusts during the period from February 1,

1988 through January 31, 1993. The Trustees shall establish a schedule of monthly payments, due on the 25th day of each month, spreading each 1988 Agreement Operators' contribution obligation over the first plan year. Prior to the end of the first plan year, the Trustees shall recalculate the ratable contributions due from the 1988 Agreement Operators to pay the costs of the first plan year, and they shall notify such operators who remain in business at that time of the recalculated contributions, if necessary, in order to cover any shortfalls in the collections of these contributions, after due efforts to collect such amounts from all such operators who were in business at the beginning of the first plan year.

(8) The Trustees shall, as soon as practicable after February 1, 1993, cause the books and records of the UMWA 1950 Benefit Plan and Trust and the UMWA 1974 Benefit Plan and Trust to be audited by an independent certified public accounting film to determine the assets and the best estimate of incurred but not paid expenses of these plans and trusts, based on available recent and historic health care claims payment experience. The Trustees shall cause additional audits and estimates of the incurred expenses of the two merged plans and trusts as additional claims are paid, as of February 1, 1994 and as of October 1, 1994. The Trustees shall notify the 1988 Agreement Operators remaining in business on February 1, 1993 of the total amount of contributions due and owing from each of them pursuant to section 9704 of the Act, ratably, based on their contributions during the term of the 1988 Agreement, as are necessary to pay off the expenses accrued by the merged plans. After conferring with Appointing Parties, the Trustees shall establish a schedule of payments to be made during the period from February 1, 1993 to October 1, 1994. Prior to October 1, 1994 the Trustees shall recalculate the ratable contributions due from the 1988 Agreement Operators to pay off the merged trusts unpaid expenses, and they shall notify such 1988 Agreement Operators who remain in business of the

recalculated contributions, if necessary, in order to cover any shortfalls in the collection of these contributions, after due efforts to collect such amounts from all such operators who were in business on January 31, 1993. These recalculations shall also be adjusted, as appropriate, to take account of more recent audits of the incurred expenses of the merged plans.

(9) The Trustees shall adjust the premiums of those 1988 Agreement Operators making payments pursuant to section 9704(i) of the Act to cover first year costs of the Combined Fund and to pay off unpaid expenses of the merged plans and trusts, pursuant to section 9704 (i) (1) (D) of the Act.

ARTICLE XIII. (Amendments)

The Trustees reserve the right at any time and from time to time to modify or amend in whole or in part any or all of the provisions of this instrument, or to terminate this Trust as permitted by law, and to the extent consistent with the provisions of the Act. No modification, amendment, or termination shall be effective unless agreed to by at least five Trustees. The Trustees shall obtain all necessary rulings and do all other acts appropriate to ensure that any payments made in accordance with the requirements of section 9704 of the IRC are deductible for Federal Income Tax purposes.

ARTICLE XIV. (Use of Trust Assets)

Except as otherwise permitted by law, and notwithstanding anything to the contrary contained in this instrument, or any amendment hereto, it shall be unlawful for any part of the Trust other than such part as is required to pay taxes and administrative expenses, to be used for, or diverted to, purposes other than for the sole and exclusive benefit of the Eligible Beneficiaries, except that in the case of a contribution which is made by an Assigned Operator or a Related Person by a mistake of fact or law (other than a mistake relating to Plan qualification), such mistaken contribution may be returned to the Assisted Operator or Related Person

within six months after the Trustees determine that the contribution was mistakenly made.

ARTICLE XV. (Applicable Law)

This instrument shall be construed, regulated and administered under Federal Law.

(Signatures)

IN WITNESS WHEREOF, the Trustees have caused this instrument to be signed in Washington, D.C. on this 1st. day of September, 1993.

/s/ Marty D. Hudson
Trustee

/s/ William P. Hobgood
Trustee

/s/ Michael H. Holland
Trustee

/s/ Elliott A. Segal
Trustee

/s/ Carlton R. Sickles
Trustee

/s/ Thomas O.S. Rand
Trustee

/s/ Gail Wilensky
Trustee

APPENDIX G

VERY CONFIDENTIAL

COAL INDUSTRY HEALTH CARE

Retiree Health Care represents perhaps the most contentious issue facing our segment of the coal industry. The feelings surrounding it are long held and deep felt. On the retiree side, pensioners have been promised health care for life and have built their financial future and security around that promise. Loss of health care would be fatal to retirees and widows and to the communities where they reside. As an organization, the UMWA is committed to make certain that promise of health care for life is honored or it must fight to the death attempting to do so. On the corporate side, rising health care costs and retiree dumping by irresponsible companies represents a threat which the industry believes ultimately could be fatal. Clearly then, unless a satisfactory solution is found which meets the needs of both sides, the 1993 negotiations will be protracted, divisive and vitriolic. Negotiations of that sort could undo the progress made to date and dash all hopes of further improving labor relations during the 1990's. Fortunately, a solution which meets the needs of both sides exists. That solution is encompassed in the recommendations of the Dole Commission. The only question to be answered is how do we convert those recommendations into law. This paper sets out a strategy which, if implemented fully, should be successful in making the Dole Commission's recommendations a reality.

Overall Strategy

Our strategy must be (1) to build a winning coalition of individuals and organizations through public relations, education and mobilization of all potential allies; (2) to neutralize the Bush administration or win its support by raising the political costs to it for opposing us; (3) to create an atmosphere of urgency that politically threatens neutral or

opposing legislators and economically threatens the communities of their constitutuents so as to make supporting our legislation imperative; (4) to maximize the chances of passage by *down playing* the effect this legislation will have on the National Health Care Debate; and (5) to maximize Congressional support by making the failure to support passage our legislation by incumbents and their opponents alike, tantamount to the denounciation of *all* elderly citizens.

Congress, to be spurred into action, must be convinced that an immediate need for legislation exists. Senator Rockefeller effectively focused Congressional attention on the need for action in the coal industry when dealing with S. 1708. He was aided significantly by the Pittston strike, the Secretary of Labor's appointment of the Dole Commission and the financial crisis then looming over the funds. Unfortunately, however, the sense of crisis has passed. To be successful we must recreate that sense of urgency. To do this we could simply have a Bill introduced and watch the fur start to fly. Though tempting and simple as that may be, we must resist it. First of all, a prematurely-introduced Bill will get distorted by our opponents. This distortion will make the educational component of our strategy more difficult, if not impossible; it may prematurely lock in votes *against* us and may force the White House to "declare" before we have had time to politically work it properly. Without a specific bill to target all of this is less likely. Moreover, if we wait, when the bill is introduced, we can truthfully say we've listened to *all* our opponents' arguments and in some fashion have addressed many of them. Our opponents will then be forced to play catchup but they will lose valuable time.

Our strategy should be to have the Special committee on Aging hold a hearing on the status of the retiree health care system in the coal industry which focuses on the decision of North American Coal to dump its several hundred retirees into the Orphan Fund. David Pryor of Arkansas is the

chairman and John Heinz is the ranking minority member. We can limit the witness list and avoid a full blown discussion of the Coal Commission's options. If the hearing goes well, it will be difficult to use the record in any way but to support the industry-wide solution we prefer. This hearing will jump start Congressional awareness. After this hearing occurs by late Spring or Early Summer, after having lobbied for several months on a "retail basis" (i.e. office-to-office) we should be ready to take our case for an industry-wide fee to the Finance Committee. Note that there is still no need to introduce a Bill. It should be noted here also that we *could* be dealing with a minimum of four committees: (1) Labor and Human Resources—Senator Kennedy (MA), Chairman; (2) Finance—Senator Bensten (TX), Chairman; (3) Education and Labor, House, Ford (MI), Chairman and (4) Ways and Means Committee—House—Rostenknwski (IL), Chairman. If our Bill is required to go through all four Committees and then stand alone, it has little chance of passage. To short-circuit this process, we will use either or both the House Labor and Senate Labor Committees to build a favorable hearing record in addition to the Senate Finance Committee. Circumstances will dictate which Committees are utilized and when they are brought into play. Then by late summer or Early Fall the viable vehicles, to which our Bill can be attached, will emerge from the Finance Committee. At this point, Senator Rockefeller, who should be the Chief Sponsor of our Bill, can determine the appropriate moment to introduce explicit legislation. This will be the lightening rod which will shock the Pension Benefit Alliance (PBA) and others into full-fledged lobbying. Before they can do more than say oppose, oppose, oppose, they will be required to analyze the Bill and develop arguments their champions will use. This will cost them valuable time, which, if we do our job properly, they cannot afford to lose. Still, the House must agree. We do not expect the Ways and Means Committee to be as favorable an arena as the Senate Finance Committee. To

be successful we will have to win over enough key House members so that the House is not a barrier to passing the Senate-passed language in Conference. Rostenkowski will be the key here. I feel certain just as we did with S. 1708 we can win his support. This process will require several personal meetings with key House members by officers of the UMWA and BCOA companies as well as significant staff work.

The Finance Committee is required to notify the Budget Committee of its revenue and spending plans by mid-March. We are already quietly working with Chairmen Bensten and Chairman Sasser to provide room in the spending and revenue plan to accomodate the industry-wide fee. We must avoid fights on the issue at this time and if need be, the language sent to the Budge Committee by the Finance Committee will be vague enough to accomodate either solution proposed by the Dole Commission.

This plan is flexible enough to change midstream to seize opportunities yet static enough to provide definite guidance.

Structure

The UMWA and BCOA alone cannot make this strategy successful. We must build a coalition, manage public relations and educate ourselves and the general public. All of this requires significant coordination which requires a formalized structure and financing. To accomplish both we should form a coalition umbrella group. We should jointly control it but allow plenty of room for partners. Its name should convey its purpose. This entity could take primary responsibility for collecting information, managing the process and raising funds. All this should be decided jointly by us. The coalition should have a Washington representative, or lead lobbyist, who has close contacts with Finance and Ways and Means Committee Members. The lead lobbyist should be high profile in Washington circles.

A. *Coalition Building.* Once the framework of structure is in place we should get as many partners from as many different quarters as is possible before we unveil the entity. In order to do this most effectively, we must educate ourselves thoroughly on the background of and the proposal itself. UMWA officers and CEOs who will be part of this reaching-out process must know the issue to convince others why it is in their best interest to join with us. This internal education process can take place separately or jointly but must be thoroughly and consistently done. Once complete, we must selectively reach out to other coal companies, big and small, coal field communities and their politicians, related industries (Oil, Chemical, Steel, Utilities), other industries, retiree groups, health care providers, other unions, religious groups, academics and influential people. Assignments related to coalition building will be made jointly by us.

Point Number 2 of our strategy calls for us to neutralize opposition by the Bush Administration by raising the political ante. Obviously the passing of the Persian Gulf Crisis has made this more difficult. Still 1992 is an election year and Bush is still sensitive and vulnerable from the Right in his own party. If the Right supported us on this issue, he just might throw them a bone and at least stay neutral. Our solution to this problem has some real appeal to the Right. It is private not public in financing. It addresses the number one issue in America, but in a very limited way. It offers them the chance to reach out to working America,. a group who feels neglected by them. Based on all of this, a coalition with the Right, particularly the Religious Right, may be possible. To see if it is possible, I contacted Pat Robertson, who ran for President in 1988. I explained the Dole Commission and the consequences of non-action to him and he asked me to come to his office for an indepth discussion of the issue. I will meet with him on April 5th. I will report on my efforts at our

first joint meeting. Also, at that time I will detail other possible coalition members from the Right and a strategy to approach them.

B. *Public Relations*. To heighten awareness of the problem we need to arrange a well-managed, cost-effective, public relations campaign. We should consider using an outside firm for this part of the campaign. The campaign should start slow and pick up speed so as to peak when our Bill is up for Vote. It should include interviews with officers, separately and jointly, op-ed pieces, interviews with experts like Hank Perritt and Bill Usery and "neutrals" who support our position. It could, if necessary move to radio and TV ads. All of it geared to building support or neutralizing would-be adversaries.

C. *Point Person*. If the coalition is to be viewed as broad-based, the main spokesman should not be from the UMWA or the BCOA companies. I suggest Hank Perritt. He was co-chairman of the Dole Commission, a former Republican appointed Undersecretary of Labor, has vast knowledge of Washington and Capitol Hill and most importantly, his integrity is beyond question. If he is willing to do it, no better choice could be made for us.

TIME TABLE

Passage of Dole Commission Legislation will likely take most of 1991 and possibly the first month or so of 1992. Our time table should be as follows:

I. *March-Early April*—UMWA/BCOA meet for full day to

A. Finalize strategy

B. Appoint Bill Drafting Committee

C. Appoint Education Committee to develop educational pieces for internal and external use

D. Define the coalition and make assignments for bringing partners into the coalition

E. Select structure, lead lobbyist and main spokesman

F. Define public relations campaign

G. Set budget

H. Discuss "crisis" management

I. Set time table for regular meetings and implementation of above

II. *April & May*—

1. Implement decisions of UMWA/BCOA joint meeting. Concentrating effort on coalition building and internal and external education.

2. Meetings with key Senate and House members by UMWA/BCOA Company officials.

3. Meetings with key Senate and House staffers by Coalition staffers.

4. Office-to-office lobbying—managed by lead lobbyist.

5. Public relations campaign starts in earnest generating grassroots support
6. Crisis is announced.
7. Special Committee on Aging holds hearing on the status of the Retiree Health Care System in the coal industry.

III. *June-July*—

1. Other Senate and House Committees hold hearings, if needed.
2. Education continues
3. Crisis situation heightens
4. Coalition building continues
5. Adjustments made

IV. *August-September*—

1. Activities of March-July continue
2. Crisis situation worsens
3. Finance Committee holds hearing on the Coal Commission
4. Develop Bill management time table and assignments

V. *October*—

1. Vehicles emerge from Finance, suitable for appending bill
2. Senator Rockefeller introduces Bill
3. Crisis situation worsens and threatens disaster.
4. Sustained targeted lobbying begins from coalition partners and continues until passage.

APPENDIX H

BCZ

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A PROFESSIONAL CORPORATION

DAVID J. LAURENT
Attorney at Law
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January 14, 2002

VIA FEDERAL EXPRESS

Wade W. Massie, Esquire
PennStuart
P.O. Box 2288
Abingdon, VA 24212-2288

RE: *The Pittston Company v. United States, et al.*

Dear Wade:

You have asked me to analyze various issues concerning the above referenced litigation and to offer my opinions regarding the same. This letter is my response to your request.

I. *Issues to Analyze*

A. The operation and business of the UMWA Combined Benefit Fund ("Combined Fund"), including the organization of the Fund, the selection and appointment of Trustees, and the powers and discretion of the Trustees.

B. The potential private influences upon and abuses by the Combined Fund, including:

1. Explaining how issues that come before the Combined Fund may affect the United Mine Workers of America ("UMWA"), Bituminous Coal Operators

Association ("BCOA"), and the companies who signed coal wage agreements between 1978 and 1987 ("Reachback Companies");

2. Showing how the interests of the UMWA and the BCOA may differ from the interests of the Reachback Companies; and

3. Providing specific examples of the potential for private influence and abuses with regard to staffing, outside counsel, eligibility, collections, and other issue.

C. The impact of *Eastern v. Apfel*, 524 U.S. 498 (1998) upon the Combined Fund, United States, and remaining operators.

II. *Summary of My Opinions*

A. The Combined Fund is unique in that Congress directed certain private parties to appoint trustees who would be charged with creating the Combined Fund, which in turn, would provide benefits to the Funds' beneficiaries and collect taxes from certain persons to pay for those benefits, all in accordance with the Coal Act and the plan documents the trustees were to draft. The Coal Act therefore gave private parties the power to create and administer a trust fund that had the power to levy taxes, with no further governmental oversight of any consequence, a circumstance that exists nowhere else to my knowledge.

B. The private parties who appoint the majority of the Combined Fund's trustees under the Coal Act—the BCOA, the UMWA, and the three Reachback Companies with the most assignments (collectively "the Appointing Parties")—each have members who have a direct financial interest in what the Combined Fund does, and that interest frequently is not uniform among

the Appointing Parties, much less with other operators who must pay the same taxes to the Combined Fund.

C. By giving the Appointing Parties the power to select the majority of the Fund's trustees, and by not otherwise restricting their involvement with the Combined Fund, Congress gave the Appointing Parties the opportunity to influence what the Combined Fund does including, in some instances, the determination of who will be burdened by the Combined Fund's taxes.

D. The Trustees have done a number of things that cannot reasonably be explained as having been for the sole and exclusive benefit of the Combined Fund's beneficiaries or in accordance with the terms of the Coal Act, but can be viewed as having been beneficial to one or more of the Appointing Parties. These actions include the following:

1. The Coal Act provides that the Appointing Parties may appoint trustees and successor trustees, and that the plan establishing the Combined Fund shall provide for the removal of trustees; however, the Trustees, with substantial input from counsel for the Appointing Parties, created a trust document which gave the Appointing Parties the right to remove any appointed trustee at any time, and for any reason whatsoever, thereby giving the Appointing Parties the power to remove any appointed trustee who administers the Combined Fund in a way that is not to their liking;

2. The Trustees, with substantial input from counsel for the Appointing Parties, created a trust document which gave a majority of the appointed trustees, i.e., any combination of the UMWA appointed Trustees and any one of the employer appointed Trustees, the power to remove any neutral trustee,

without specifying any basis or grounds for removal, thereby giving the Appointing Parties the power to remove any neutral trustee who administers the Combined Fund in a way that is not to their liking;

3. The Trustees, with substantial input from counsel for the Appointing Parties, created a trust document which authorizes them to use outside "co-counsel," a practice never used by the prior plans in their 40 year history, thereby giving the Trustees a basis for jointly hiring the law firms that historically have represented the UMWA and the BCOA, and, thereby, further giving the UMWA and the BCOA the opportunity to have their legal positions concerning the Combined Fund pursued at the Fund's cost and expense;

4. The Trustees provide the Appointing Parties with full rights of access to the Combined Fund's records and other information, while prohibiting the disclosure of such confidential information to anyone else, thereby insuring that the Appointing Parties are uniquely positioned to have the knowledge and opportunity to influence what the Combined Fund does;

5. The Trustees appointed by the Appointing Parties have regularly met with their respective Appointing Parties to provide them with confidential information concerning the Combined Fund's activities and to ascertain the Appointing Parties' views on issues before the Combined Fund, a right that is not accorded to anyone else who is subject to the taxes levied by the Combined Fund, thereby further insuring that the Appointing Parties are uniquely positioned to have the knowledge and opportunity to influence what the Combined Fund does;

6. The Trustees, contrary to the advice of an independent attorney, the initial decision of in-house employees, and the plain language of the Coal Act and the trust document, but in response to requests from the UMWA and the BCOA, directed the Combined Fund to provide benefits to the dependents of eligible beneficiaries who were not receiving benefits from the predecessor plans on or before July 20, 1992, thereby forcing numerous operators and the AML Fund to pay taxes for over 700 beneficiaries who should have been assigned to the UMWA 1992 Benefit Plan ("1992 Plan") and, thereby, also removing the possibility that 1988 Agreement Operators would have to pay for those beneficiaries (many of whom would be considered orphans) by way of contributions to the 1992 Plan;

7. The Trustees, contrary to the plain language of the Coal Act, increased (by way of a resolution) the $500 earnings limitation that had been in the prior plans to $1,000 (which is what the UMWA and BCOA did in their 1993 National Bituminous Coal Wage Agreement), thereby forcing operators to pay taxes for nearly 300 beneficiaries who otherwise would have been ineligible for benefits;

8. The Trustees, at the request of the BCOA and UMWA, sought permission from the Department of Labor to use Combined Fund assets to pay for a dispute resolution procedure that would have applied only to individuals covered by collectively bargained benefit plans and, if granted, would have eliminated the need for current NBCWA signatories to pay for such a procedure;

9. For a period of over 1 year, while the Trustees were searching for a new Executive Director, the Trustees used "co-administrators," each of whom had

direct ties with the UMWA or the BCOA, thereby giving those Appointing Parties additional opportunities to influence what the Combined Fund did; and

10. The Trustees, in the settlement of a lawsuit against Pittston, demanded that Pittston dismiss separate cases against the UMWA and BCOA, thereby furthering the UMWA's and BCOA's interests.

E. The Appointing Parties' role in the Combined Fund is unique in that, unlike collectively bargained plans, where the employers bound by the plan contractually agreed to give certain parties the right to select trustees and be involved with the administration of the plan, those burdened by the Combined Fund's taxes never agreed to give the Appointing Parties any authority to act on their behalf, and the Appointing Parties have no reason to act other than in their own self interest.

III. *Reasons for My Opinions*

A. *Background Information*

1. *UMWA*

The UMWA is a union that represents coal miners. During the period of 1950 through 1980, the UMWA represented a significant portion of the employees who produced coal in this country. Since then, however, the UMWA's active membership has dropped considerably, and at present, retirees make up the majority of its members.

2. *BCOA*

The BCOA is a multiemployer bargaining association which represents companies whose employees are represented by the UMWA for purposes of collective bargaining and other related matters. During the period of 1950 through the mid-1970s, a substantial number of the companies that

employed UMWA employees were members of the BCOA. Since then, however, the BCOA's membership has continued to decline to the point where its membership is now down to approximately 23 companies; however, even during this latter period, the BCOA included two of the largest UMWA-represented employers in the industry (Consolidation Coal Company and Peabody Coal Company).

3. *NBCWA*

The collective bargaining agreements negotiated every few years since 1950 by the BCOA and UMWA are known as National Bituminous Coal Wage Agreements ("NBCWA"). Generally, the NBCWAs have been adopted by the rest of the UMWA-represented industry on a me-too basis, with or without some individualized modifications.

4. *The UMWA Health and Retirement Funds*

The UMWA Health and Retirement Funds ("Funds") is a term that refers to a collection of trust funds that provide pension, health, and death benefits to UMWA retirees and their dependents. Prior to the Coal Act, the Funds consisted of the following collectively bargained plans established by the UMWA and BCOA under the NBCWAs: UMWA 1950 Pension Plan, UMWA 1950 Benefit Plan, UMWA 1974 Pension Plan, UMWA 1974 Benefit Plan, and the UMWA Deferred Cash Savings Plan of 1988. Since the Coal Act was passed, the Funds also include the UMWA 1993 Benefit Plan, which is a collectively bargained plan, as well as the Combined Fund and the 1992 Plan, which are statutorily created pursuant to the Coal Act; however, the UMWA 1950 and 1974 Benefit Plans no longer exist, as they were merged into the Combined Fund, as required by the Coal Act.

Prior to the Coal Act, the collectively bargained plans were administered by five trustees, with two appointed by the UMWA, two appointed by the BCOA, and one neutral appointed by the other four. Since shortly after the Coal Act

was passed, however, the collectively bargained trusts have been administered by four trustees—without a neutral trustee.

Signatories to the NBCWAs contributed to the Funds in accordance with rates established in the NBCWAs. From 1950 through 1987, signatories generally contributed based on a combination of tons produced, tons purchased, and hours worked. In the 1988 NBCWA, however, contributions were limited to hours worked and tons purchased. This change was of great benefit to the larger, more efficient operators and, as discussed more fully below, helped to cause substantial deficits in the Funds.

5. *Individual Employer Plans*

Beginning in 1978, the NBCWAs shifted the duty to provide health benefits for UMWA retirees to the individual signatory employers, who were required to establish Individual Employer Plans ("IEPs) to provide benefits to both active and retired employees. With this shift to IEPs, the UMWA 1974 Benefit Plan was retained for the limited purpose of providing benefits to UMWA retirees whose employers went out of business.

6. *Period of adversity among the Funds, the UMWA, and the BCOA*

During the late 1980s and early 1990s, the Funds, the UMWA, and the BCOA were involved in a series of very contentious cases relating to coverage under and contributions to the Funds. These cases included the following:

a. *District 29, UMWA v. 1974 Benefit Plan & Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) and *UMWA International Union v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd.*, 902 F.2d 1158 (3d Cir.), *cert. denied*, 499 U.S. 904 (1990)

In *District 29, UMWA v. Royal Coal Company*, 768 F.2d 588 (4th Cir. 1985), the Court held that an employer who

ceased to be signatory to an NBCWA ceased to have a contractual obligation to provide health benefits to its retirees. Following this decision, the courts in the above mentioned cases ruled that the UMWA 1974 Benefit Plan was obligated to provide benefits to such retirees, thereby substantially increasing the number of beneficiaries in that Plan and the contributions needed to fund those benefits.

The BCOA participated in the *Nobel* case as an intervener, and sided with the UMWA 1974 Benefit Plan against the UMWA. Therefore, the UMWA was adverse to both the Funds and the BCOA in this litigation.

b. *BCOA v. Connors*, 867 F.2d 625, 10 EBC 1833 (D.C. Cir. 1989)

This case involved a claim by the BCOA and another employer that they did not have to continue contributing to the UMWA 1950 Pension Plan once it became fully funded in May, 1987, and a counterclaim by the Plan seeking a declaration that contributions were due and owing. The UMWA participated in the case in support of the Plan. The Court ultimately ruled in favor of the 1950 Plan. Consequently, this was a case in which the BCOA was adverse to the UMWA and the Funds.

c. *Connors v. Link Coal Company,* 970 F.2d 902, 15 EBC 2013 (D.C. Cir. 1992)

In 1987, the UMWA negotiated a series of collective bargaining agreements with non-BCOA employers whereby, in exchange for certain job security commitments, the UMWA agreed to reduce the employer's obligation to continue contributing to the 1950 Pension Plan to zero. The 1950 Pension Plan challenged the validity of the agreements, claiming that language in the trust documents known as the Evergreen Clause prohibited the UMWA and the employers from varying the contribution obligations stated in the NBCWA. The BCOA participated in this case in support of

the Plan and the UMWA participated in support of the employers. The Court ultimately ruled that there were questions of fact that precluded summary judgment in favor of the employers. Thus, this was a case in which certain employers and the UMWA were adverse to the BCOA and the Funds.

d. *UMWA 1950 Benefit Plan v. BCOA*, 898 F.2d 177, 12 EBC 1036 (D.C. Cir. 1990) and *McGlothlin v.Connors*, 142 F.R.D. 626, 15 EBC 1321 (W.D. Va. 1992)

In the first of these two cases, the 1950 Benefit Plan claimed that the BCOA should exercise its rights under the NBCWA and raise contribution rates to fend off deficits the Funds were facing. The BCOA refused to raise contribution rates, claiming the deficits were due to the Funds' acceptance of agreements that did not require contributions to one or more plans and/or mismanagement. The Court ultimately held that further findings were required before the requested injunction could be issued. In the second case, however, the Court enjoined the BCOA and ordered it to raise rates in order to avoid a cessation of or reduction in benefits. Consequently, this was a case in which the Funds and the BCOA were adverse to one another.

e. *UMWA 1974 Pension Trust v. Pittston Company*, 984 F.2d 1600, 16 EBC 1600 (D.C. Cir. 1993)

This case involved a claim by the 1974 Pension Trust that an agreement that Pittston and the UMWA had negotiated, pursuant to which Pittston would have contributed to the Funds in amounts and on a basis different than that set forth in the current NBCWA, violated the Evergreen Clause. The Funds, supported by the BCOA, claimed that the so-called "Evergreen Clause" in the trust documents required Pittston to continue to contribute to the Funds on the same rate and basis as set forth in the current NBCWA. The Court ultimately upheld a judgment against Pittston; however, the

issue continued to be litigated against numerous other employers, several of whom filed cross-claims against the UMWA, until all of this litigation was settled in the mid-1990s. In general, the employers and the UMWA were adverse to the Funds and the BCOA in this litigation.

In sum, this period saw great turmoil relating to the Funds, with the Funds taking positions that were challenged by or adverse to both the BCOA and the UMWA in many instances. In other words, neither the BCOA nor the UMWA were satisfied with the Funds which, at that time, had two employer-appointed trustees, two union-appointed trustees, and one neutral trustee appointed by the others.

7. *Pittston*

The Pittston Company ("Pittston") is an entity that has a long history in the coal industry, much of it though operating subsidiaries that have been signatories to NBCWAs. In 1989, however, Pittston and the UMWA could not agree on a new contract, principally due to disputes over Pittston's desire to change the nature of its participation in the Funds. This dispute culminated in a violent strike that received national attention. Eventually, the strike was settled, but the Funds successfully challenged the settlement under the Evergreen theory.

B. *Coal Act*

1. *Basic Structure*

a. *Combined Fund*

The Coal Act directed certain private parties to appoint trustees who would then create a new trust fund to be known as the UMWA Combined Benefit Fund ("Combined Fund"). The UMWA could appoint two trustees, the BCOA could appoint one trustee, the three pre-1988 operators with the most beneficiaries in the Combined Fund (Pittston, LTV, and Bellaire Corporation) could appoint one trustee, and those

four trustees could appoint three neutral trustees. Successor trustees were to be appointed in the same manner, and the plan providing for the Combined Fund was to provide for the removal of trustees. *See* Sections 9702(a)(1) and (b).

The Coal Act also provided that the UMWA 1950 and 1974 Benefit Plans would be merged into the Combined Fund, and that the Social Security Administration ("SSA") would assign the retired miners in the Combined Fund to the employers who had employed them pursuant to a three-tier formula based on the last NBCWA the employer had signed, and the amount of time the miner had worked for the employer. *See* Sections 9702(a)(2) and 9706 of the Coal Act. The miners' dependents would be assigned to the same operator; however, the Coal Act clearly limited eligibility to those receiving benefits from the 1950 or 1974 Benefit Plans as follows:

> (e) Limitation on Enrollment. The trustees of the Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.
>
> (f) Eligible beneficiary. For purpose of this subchapter, the term "eligible beneficiary" means an individual who (1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or (2) on such date was eligible to receive, and receiving benefits in either such plan by reason of a relationship to such retiree.

See Sections 9703(e) and (f) of the Coal Act.

The Coal Act also authorized the Trustees to collect annual premiums (which have been determined to be taxes, *see The Pittston Company v. United States*, 199 F.3d 694 (4th Cir. 1999)) from operators who were assigned miners and

dependents in the Combined Fund by SSA, to use up to 210 million dollars from the UMWA 1950 Pension Trust to help pay for unassigned beneficiaries, and later, to use transfers from the Abandoned Mine Lands Fund ("AML Fund") to help pay for unassigned beneficiaries. *See* Sections 9704(a) and (f)(2) and 9705(a) and (b) of the Coal Act. Nonetheless, SSA was given the sole authority to set the annual premium and annually increase it based on inflation in the medical cost component of the Consumer Price Index. *See* Section 9704(b) of the Coal Act. In addition, the Coal Act limited the amount the Combined Fund could spend on benefits, such that they "do not exceed the total premiums required to be paid to the Combined Fund under section 9704(a)," and permitted the Trustees to "reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund . . . during the plan year." Sections 9703(b)(2)(ii) and (d) of the Coal Act.

The operators who have been assigned miners and dependents by SSA fall into one of three categories: 1988 Agreement operators, who are operators that signed the 1988 NBCWA; Reachback Companies, who are operators that signed the 1978, 1981, or 1984 NBCWAs; and Superreachback Companies, who are operators that last signed NBCWAs before 1978.

2. *1992 Plan*

The Coal Act also directed the BCOA and the UMWA to create a second new plan, to be known as the UMWA 1992 Benefit Plan ("1992 Plan"). The 1992 Plan was to provide benefits to individuals who would have been eligible under the prior 1950 or 1974 Benefit Plans, but were not eligible to receive benefits from the Combined Fund. *See* Sections 9712(a) and (b) of the Coal Act. The last signatory operator who employed any miner in the 1992 Plan is responsible for paying contributions to the 1992 Plan for that miner and his

dependents. In addition, miners and dependents who are not paid for by a last signatory operator, either because the operator is out of business or cannot be determined, receive benefits that are paid for by contributions from 1988 Agreement Operators known as Annual Prefunding Premiums. *See* Section 9712(d) of the Coal Act.

3. *Significant court decisions and other developments under the Coal Act.*

In general, the 1988 Agreement Operators who are still operating (several of whom also are or were members of the BCOA) largely applaud the Coal Act and support its enforcement. In contrast, 1988 Agreement Operators who are no longer operating, as well as the Reachback and Super-reachback Companies, generally have opposed the Act, have challenged it on constitutional grounds, and have sought amendments that would have relieved them of some of their obligations and, in some cases would have placed those burdens on the 1988 Agreement Operators.

Although efforts to amend the Coal Act have met with little success, in 2000, Congress did make certain minor changes, principally for the purpose of permitting the Combined Fund to receive additional monies from the AML Fund to stave off looming deficits. *See* P.L. 106-291, 114 Stat. 922 (2000).

Three court cases are particularly pertinent to a current understanding of the Combined Fund. First, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Supreme Court struck down assignments under the Fifth Amendment to operators who last signed an NBCWA before 1974. As a result of that decision, SSA subsequently revoked all assignments to operators who did not sign a 1974 or later NBCWA (and did not have any related persons who signed such an agreement). SSA then, where possible, reassigned those miners and beneficiaries to other operators. The Combined Fund followed suit by issuing (1) refunds to the

operators who had their beneficiaries revoked, (2) seeking full retroactive contributions, dating back to 1993, from operators who received new assignments as a result of SSA's reassignments, and (3) by seeking payment from the AML Fund for miners and beneficiaries who could not be reassigned to any other operators. This case is significant because it removed many of the Superreachback Companies as contributors to the Combined Fund, but shifted their obligations to the remaining operators and the AML Fund.

Second, in *National Coal Association v. Chater*, 81 F.3d 1077 (11th Cir.1996), the Court held that SSA had wrongly set the annual premium rate too high, and ordered SSA to use a lower rate. The Combined Fund separately sued SSA in the District of Columbia, seeking to require SSA to raise the rate. *See Holland v. Massanari.* That case is still ongoing. In the interim, however, the Combined Fund is using the lower rate mandated by the *National Coal Association* decision. Accordingly, the latter decision is significant because it reduced the Combined Fund's current and projected assets and, therefore, contributed to its projected deficits.

Finally, in *Fawn Mining Corporation v. Hudson*, 20 EBC 1065 (D.C. Cir. 1996), the Court held that the Coal Act's literal definition of eligible beneficiary precluded the Combined Fund from providing benefits to miners who were eligible to begin receiving benefits from the 1974 Benefit Plan as of July 20, 1992, but did not actually begin to receive the benefits until after that date. The Court reasoned in pertinent part that, "[t]he statutory phrase of CHRIBA that requires a retiree 'to be eligible for, and receiving, benefits' on July 20, 1992, means what it says." 20 EBC at 1069. The subject miners and beneficiaries were then placed in the 1992 Benefit Plan and received virtually the same benefits.

This case is significant because the operator who is responsible for a miner and his dependents can differ depending on the plan involved. For example, a miner in the

Combined Fund could be assigned to a different operator than he would be assigned to if he was in the 1992 Plan, since the Combined Fund uses a three tier scheme based on the NBCWAs signed and the duration of employment, whereas the 1992 Plan looks only to the last signatory operator. Consequently, by holding that the miners in *Fawn* could not be in the Combined Fund, the Court effectively determined who should be held responsible for paying for those miners' and their dependents' benefits.

4. *Trustee Overlap*

The Trustees of the various plans that make up the Funds overlap quite a bit. For example, with minor exceptions, the BCOA and the UMWA appointed trustees have been the same for each plan (collectively bargained and statutory). At present, Michael Holland, former General Counsel of the UMWA, and Marty Hudson, former Assistant to the UMWA's President, are the UMWA appointed Trustees for the Combined Fund, the 1992 Plan, the 1950 Pension Plan, the 1974 Pension Plan, and the 1993 Benefit Plan; Elliot Segal, an industry consultant, is the BCOA appointed Trustee to the Combined Fund and the 1992 Plan; and Elliot Segal and Frank Dunham are the BCOA appointed Trustees to the 1950 Pension Plan, 1974 Pension Plan, and 1993 Benefit Plan. The Combined Fund Trustee appointed by the Reach-back Companies—Thomas Rand—as well as the Combined Fund's neutral Trustees—William Hobgood, Carl Van Horn, and Gail Wilensky—do not serve as Trustees for any other plans within the Funds.

C. *Forces that led to the Coal Act*

The decade of the 1980s witnessed several significant changes that impacted the UMWA 1950 and 1974 Benefit Plans. First, many operators withdrew from the unionized sector of the industry, either because they exited the mining business entirely, or because they shifted production to non-

union mines. Second, court cases forced a substantial number of additional beneficiaries onto the 1974 Benefit Plan. Third, the UMWA and several employers agreed to collective bargaining agreements which eliminated or reduced their obligation to contribute to the 1950 and/or 1974 Benefit Plans. Fourth, the BCOA and the UMWA agreed, in the 1988 NBCWA, to switch from a tons and hours basis for contributing to the 1950 and 1974 Benefit Plans to an hours only basis, which meant a substantial reduction in contributions for the larger, more efficient operators. Fifth, although the BCOA, in the 1988 NBCWA, agreed to guarantee the benefits promised by the 1950 and 1974 Benefit Plans, and to raise rates as needed, the BCOA refused to raise rates despite large deficits in the Plans until ordered to do so in the *McGlothlin* case. Sixth, the 1950 and 1974 Benefit Plans experienced substantial inflation in the cost of providing health care benefits to the beneficiaries in those Plans. Seventh, the 1989 Pittston Strike focused national attention on the coal industry benefit plans. Eighth, the BCOA was threatening not to agree to pay for benefits for the beneficiaries in the 1950 and 1974 Benefit Plans after the 1988 NBCWA expired on February 1, 1993, many of whom had last worked for operators who were no longer contributing to those Plans and had no contractual obligation to do so.

Contending that there was a crises at the Funds, the BCOA and the UMWA strongly supported governmental intervention which would have had the effect of largely removing the retiree health benefit issue from the negotiations for the successor NBCWA. Moreover, it appears that, given the UMWA' s and the BCOA's respective disagreements with the Funds in the litigation cited above, both the UMWA and the BCOA wanted a governmental solution that would not leave them with the same lack of control or influence. In other words, it appears that the solution the BCOA and UMWA sought—and the solution they achieved—was one

that provided them with opportunities for substantial, yet relatively equal involvement in the new statutory plans. Indeed, since the Coal Act was passed, neither the 1992 Benefit Plan nor the collectively bargained plans have appointed a fifth neutral trustee and, instead, have operated solely with the UMWA and BCOA appointed trustees, which is quite different than how the 1950 and 1974 Plans had been administered for years.

D. *Involvement of the Appointing Parties in the Combined Fund*

1. *The UMWA and BCOA*

The UMWA and the BCOA have substantial involvement in the Combined Fund. First, the Coal Act authorizes the UMWA and the BCOA to appoint three of the Combined Fund's Trustees. *See* Section 9702(b) of the Coal Act. In addition, since a majority of the trustees appointed by the UMWA, the BCOA, and the Reachback Companies select the remaining trustees, the UMWA, along with the BCOA, effectively can control the selection of a majority of the Combined Fund's Trustees.

Second, although the Coal Act provides that the Combined Fund's Trustees shall create a new plan known as the Combined Fund, the Trustees gave the UMWA and the BCOA—through their historic counsel, Mooney, Green, Baker, Gibson and Saindon and Morgan, Lewis and Bockius—the opportunity to have substantial involvement in the drafting of the plan and trust documents. This is significant because, among other things, the trust document permits the UMWA and the BCOA to remove their respective Trustees for any reason and at any time, and gives the BCOA and the UMWA appointed Trustees the power to remove the neutral Trustees for any reason and at any time. *See* Article III of the September 1, 1993 Trust Agreement.

Third, the trust document directly authorizes the Trustees to give the UMWA and the BCOA a copy of each document sent to an eligible beneficiary or filed with the Government, as well as "such other information and/or documentation as such party or parties may reasonably request and within a reasonable time from when such request shall be made." *See* Article XI of the September 1, 1993 Trust Agreement. In addition, the Trustees have given the Appointing Parties broad access to Combined Fund information. For example, the Trustees' practice has been to permit the BCOA and the UMWA to have liaisons who attend Trustee meetings, and to distribute information to each of the Appointing Parties. *See* Minutes dated May 24, 1995.

In addition, the BCOA and UMWA Trustees regularly meet with representatives of their Appointing Party to discuss issues concerning the Combined Fund, and to solicit input from the Appointing Parties. In fact, the Trustees amended the trust document so as to make expenses incurred for meeting with representatives of the Appointing Parties reimbursable. *See* UMWA Combined Benefit Fund Master Resolution No. 1, Amendment No. 1. Moreover, for several years, the BCOA paid their appointed Trustee (Segal) $25,000 per year for the opportunity to meet with him to discuss Combined Fund matters, and the UMWA employed Trustee Hudson to work, first as a consultant and then as a full-time employee in 1995 and 1996, during which time he continued to hold his position as a Trustee of the Combined Fund.

While giving broad access to the Appointing Parties, the Trustees limit the disclosure of information to other operators who pay taxes to the Combined Fund. For example, the Funds' Conflict of Interest Policy provides that "Funds personnel may not release to anyone not employed by the Funds to use for their own advantage data or information of a confidential nature concerning the Funds." Moreover, as a

matter of practice, the Trustees do not provide the information they give to the Appointing Parties to anyone else. Consequently, the Appointing Parties have access to substantial information concerning matters before the Combined Fund that is not provided to the vast bulk of the operators who pay taxes to the Combined Fund.

Fourth, the trust documents provide that the Trustees may retain "co-counsel." In early 1993, the Trustees decided to retain the UMWA's historic firm—Mooney, Green—as well as the BCOA's historic firm—Morgan Lewis—to represent the Combined Fund in constitutional challenges to the Coal Act. Since then, both firms have continued to represent the Combined Fund in constitutional litigation as well as certain other matters, and the Combined Fund's total payments to these firms through 1999 was nearly $6,000,000.

During this same period, with rare exceptions, neither the UMWA nor the BCOA intervened in or filed amicus briefs in any litigation involving the Combined Fund. In short, unlike the pre-Coal Act period, during which time the Plans retained their own counsel and the UMWA and BCOA paid Mooney Green and Morgan Lewis to help them achieve their goals with respect to litigation involving the 1950 and 1974 Benefit Plans, the Trustees' use of this "co-counsel" arrangement has largely eliminated any occasion for the UMWA or the BCOA to pay anything to have their views pursued in litigation involving the Combined Fund.

2. *Reachback Companies*

Like the BCOA and the UMWA, the three Reachback Companies who appoint a trustee were given the opportunity to have their counsel participate in the drafting of the plan and trust documents, have access to most if not all of the information that is provided to the UMWA and the BCOA, and have the opportunity to communicate with their appointed Trustee (Rand) to make their views known to the other Trustees.

E. *Involvement of the Government in the Combined Fund*

As mentioned above, SSA assigns miners and sets the annual premium, and the AML Fund transfers certain amounts to the Combined Fund to pay for benefits for unassigned beneficiaries. In addition, the Combined Fund's assets and liabilities are included in the Government's Annual Budget. Nonetheless, the Government does not review the Combined Fund's plan and trust documents to insure that they comply with the Coal Act, does not review the Trustees' application of the Coal Act, does not review the Trustee's expenditures, does not review the Trustees' involvement with private parties, does not review the Trustees' success in implementing cost-containment measures, and, with one exception discussed more fully below concerning beneficiaries added after July 20, 1992, the Government does not review the Trustees' decisions regarding eligibility for benefits.

F. *Discretion and Authority of the Trustees*

The Trustees expressly gave themselves broad discretion by inserting the following language into the Trust Agreement:

> Subject to the provisions of the Coal Industry Retiree Health Benefit Act of 1992, [and] this Trust and the Plan, the Trustees shall have full and exclusive authority and discretion to determine all question of coverage and eligibility (not determined by the Secretary of Health and Human Services), including all factual determinations, investment of trust funds, delivery of benefits, and all other related matters. They shall have full discretionary power to construe the provision of this Agreement and Declaration of Trust and the Plan.
>
> The Trustees shall comply with all obligations imposed on them by the Act, and shall do all acts within their power to assist the Secretary of Health and Human Services in carrying out the functions assigned to the Secretary by the Act.

> The Trustees are empowered to promulgate such reasonable rules and regulations as they may determine to be desirable for carrying out the purpose of this Trust and/or the Plan . . . . In addition to any other powers granted to the Trustees, the Trustees are empowered to do all acts which they deem necessary or proper and to exercise any and all powers of the Trustees under this instrument under such terms and conditions as they may deem to be in the best interest of the Trust.

See Article V of the September 1, 1993 Trust Agreement. Moreover, the Trustees gave themselves the right to amend the Trust Agreement at any time, subject to a vote of at least 5 of the Trustees. *See* Article XIII of the September 1, 1993 Trust Agreement.

Nevertheless, the Trustees' discretion is limited somewhat by the wishes of the Appointing Parties. The Trustees drafted the trust document so that the BCOA, the UMWA, and the Reachback Companies have unfettered discretion to remove their Trustees and appoint new trustees, or to remove any of the neutral Trustees and appoint new ones. In other words, a Trustee who is being paid $70,000 to $100,000 per year, for what amounts to part-time employment, can be removed at any time and for any reason by his or her appointing party. Since this is not a collectively bargained plan drafted by the settlors, one wonders why the Trustees gave the Appointing Parties such unfettered rights to remove them.

G. *Unusual exercises of Trustee discretion that benefitted one or more of the Appointing Parties*

Although the Coal Act and fiduciary duties ostensibly limit the Trustees' actions, in a number of instances, the Trustees exercised their discretion in ways that are difficult to explain other than as efforts to benefit one or more of the Appointing Parties.

1. *Over 700 dependents were added to the Combined Fund, rather than the 1992 Plan, even though they were not eligible for or receiving benefits on July 20, 1992.*

This issue involves what are generally known as "after-acquired dependents," i.e., individuals who became dependents of miners after the miners were placed in the Combined Fund. As discussed above, Sections 9703(d) and (e) of the Coal Act expressly condition eligibility for the Combined Fund on being eligible for and receiving benefits from the 1950 or 1974 Benefit Plans as of July 20, 1992, either as a miner or a dependent.

Initially, it appears that the "after-acquired dependents" were placed in the 1992 Plan since they did not meet the Combined Fund's express requirements for eligibility, but would have been eligible to receive benefits from the 1950 or 1974 Benefit Plans. Shortly thereafter, a question arose as to whether the "after-acquired dependents" should be put in the Combined Fund. On or about February 16, 1993, a law firm representing the Reachback Companies gave Trustee Rand a legal memorandum explaining why the "after-acquired dependents" belonged in the 1992 Plan.

Nonetheless, on May 26, 1993, the BCOA wrote to the UMWA complaining that the "after-acquired dependents" should have been placed in the Combined Fund, that the "Combined Fund Trustees are undecided on this issue," and that the BCOA would appreciate hearing from the UMWA "so that the issue can be carefully and thoroughly considered by the Trustees to ensure a sound result consistent with the legislative history and purposes. . . ." Thereafter, on May 26, 1993, the Trustees agreed to place the "after-acquired dependents" in the Combined Fund; however, for reasons that were not explained in the minutes, the Trustees "deferred decision as to how to define the eligibility for coverage for these individuals." *See* May 26, 1993 Minutes.

In 1994 and 1995, the Combined Fund reconsidered this issue. The Combined Fund apparently secured two additional legal opinions, one of which supported the BCOA's and UMWA's position, and one of which apparently supported the original decision to place these individuals in the 1992 Plan. In the end, however, the Trustees reaffirmed their original decision. *See* Minutes dated February 8, 1994, June 26, 1995, and September 18, 1995.

In November, 1995, the Combined Fund Plan document was issued. The Plan document defined the term eligible beneficiary as follows: "'Eligible Beneficiary' has the meaning set forth in the Trust [which essentially quotes the Coal Act definition]. In addition, individuals who first met the eligibility rules for coverage as dependents of primary beneficiaries after July 20, 1992 shall be included as eligible beneficiaries under the Plan." In other words, the Trustees made the "after-acquired dependents" eligible by saying so in the Plan document.

As a direct result of this decision, the Trustees treated over 700 "after-acquired dependents" as if they had been assigned by SSA and charged operators annual premiums for each such individual. In addition, where the miner was unassigned, and therefore had his or her benefits paid for by transfers from the 1950 Pension Plan and the AML Fund, the Trustees did the same thing with their "after-acquired dependents."

In 2000, the U.S. Department of the Interior questioned the Trustees' decision to place the "after-acquired dependents" in the Combined Fund, insofar as it required the AML Fund to pay for their benefits. In an effort to justify the decision, the Combined Fund's General Counsel wrote an opinion letter. The thrust of the opinion letter is that, the Combined Fund could ignore the literal language of the Coal Act because Congress must have intended for miners and dependents in the same family to receive benefits from the same plan, particularly since placing them in separate plans could subject

them to additional co-pay expenses that have family limits. The Department of Interior has not accepted this explanation and, as far as I can determine, it remains an open issue.

In my opinion, the Trustees' actions in this regard are difficult to justify as the product of a good faith reading of the Coal Act. First, the language of the Coal Act and the trust document are clear and unambiguous and clearly prohibit the Trustees from adding individuals who were not "eligible to receive, and receiving benefits" from the 1950 or 1974 Benefit Plans as of July 20, 1997. Second, in light of the decision in *Fawn Mining*, where the Court stated that, given the express language of the Coal Act's eligibility provisions, it could not add a miner to the Combined Fund who was eligible for, but not actually receiving benefits from the 1950 or 1974 Benefit Plans as of July 20, 1992, there was no sound reason for the Trustees to have adopted a different position with respect to the "after-acquired beneficiaries." Indeed, even if the issue was close, which it is not, the more prudent course of action would have been to rely on the unambiguous statutory text until a court directed the Trustees to do otherwise.

This then leads to the question of why the Trustees decided to add the "after-acquired dependents" to the Combined Fund. One possible answer is that they wanted to further the BCOA's and the UMWA's interests. For example, if the "after-acquired dependents" were placed in the 1992 Plan, many of them would be considered orphans, for whom the 1988 NBCWA signatories (including BCOA members) would bear the burden of paying for the cost of their benefits. In contrast, if they were placed in the Combined Fund, many would be assigned to operators who were still in business, and those that would be unassigned would be paid for by the AML Fund. In addition, as noted above, if the "after-acquired dependents" were placed in the Combined Fund, then they would not have to pay any additional co-pays. In short,

the BCOA's and the UMWA's interests were furthered by having the "after-acquired dependents" placed in the Combined Fund.

2. *The $500 earnings limit was raised to $1,000*

The Coal Act provides that the Combined Fund "shall to the maximum extent feasible be substantially the same as (and subject to the same limitation of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan." *See* Section 9703(b) of the Coal Act. The 1950 and 1974 Benefit Plans each provided that beneficiaries who earned over $500 per month were ineligible for benefits until their monthly earnings dropped below that level. Nonetheless, when the BCOA and the UMWA negotiated a new NBCWA in 1993 and raised the earnings limit from $500 to $1000 for purposes of the collectively bargained plans, the Trustees did the same thing for the Combined Fund. Indeed, at one point, the Trustees agreed to link the earnings limit to the NBCWA, but later changed the resolution to simply state that it was being raised to $1,000. *See* Minutes dated December 15, 1994 and February 22, 1995.

The Trustees have never articulated why they made this change. Indeed, David Allen, the Fund's General Counsel, could not recall any reasons the Trustees publically offered for making this change. Allen Deposition at 192.

3. *Seeking authority to use Combined Fund money to handle RODs*

On January 19, 1995, the UMWA and the BCOA wrote to the Combined Fund's Trustees and asked them to seek permission from the Department of Labor to use Combined Fund assets to pay for the resolution of disputes program ("RODs") under the collectively bargained health plans. They reasoned that the 1950 Benefit Plan had done the same thing, and that since part of the Combined Fund's assets now consisted of the 1950 Benefit Plan's assets, the Combined

Fund should assume this responsibility, instead of forcing the current signatories to pay for the cost of the RODs program.

On March 14, 1995, the Trustees submitted a request to the Department of Labor seeking permission to pay for the RODs program. Subsequently, on July 7, 1995, Trustee Rand filed his own opposition to the request, explaining that the Trustees had voted to do this at a time when he was absent, and that there was no legitimate reason for using Combined Fund's assets to pay for this program since it benefitted an entirely different set of beneficiaries. Ultimately, the Department of Labor denied the request.

Although the request was denied, the fact that the Trustees sought permission in the first place is difficult to justify. As Trustee Rand observed, the program would not benefit any of the Combined Fund's beneficiaries. Moreover, the only persons who would benefit would be the current NBCWA signatories, who would be relieved of the obligation to pay for such a program.

4. *Use of "co-counsel"*

During the two decades prior to the Coal Act (and possibly longer), the UMWA Health and Retirement Funds used counsel who were entirely independent from the BCOA and the UMWA. Indeed, as discussed above, in many instances in the late 1980s and early 1990s, counsel for the Funds were adverse to counsel for the UMWA and/or the BCOA.

Nonetheless, the Combined Fund has adopted a practice of using "co-counsel," consisting of the BCOA's and the UMWA's historic counsel. The fees paid to these firms through 1999 were nearly $6,000,000, and there is no reason I can perceive for simultaneously having both firms participate on behalf of the Combined Fund, along with its in-house counsel and, in many cases, local counsel. Moreover, with rare exceptions, since the Combined Fund adopted this practice of using "co-counsel," neither the BCOA nor the

UMWA have separately intervened in or filed amicus briefs in litigation involving the Combined Fund.

5. *The use of "co-administrators"*

During the period of 1999-2000, the Fund's Executive Director left and was replaced by "co-administrators," consisting of two individuals, each of whom had connections to the UMWA or the BCOA. For example, Marty Hudson, the UMWA appointed Trustee and Elliot Segal, the BCOA appointed Trustee, were the first co-administrators, and later, Marty Hudson and Joseph Brennan, former president of BCOA, were the co-administrators. Allen Deposition at 23.[1]

As with the use of "co-counsel," the Funds never previously used "co-administrators," and so far as I can tell, there was no good business reason to do so here. Indeed, David Allen, the Funds' General Counsel, was unable to give a reason for why the Funds chose to use "co-administrators." Allen Deposition at 24.

6. *The Pittston Evergreen settlement*

In the latter part of 1995, Pittston and the Combined Fund began serious discussions concerning a settlement of the Evergreen case that was pending against Pittston. During the course of these settlement discussions, the Trustees, through their counsel, made it clear to Pittston that the Combined Fund would not settle the case unless Pittston also agreed to dismiss separate cases it had filed against the BCOA and the IJMWA. Pittston ultimately relented and all three cases were settled at the same time.

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[1] ERISA provides that an employee benefit plan "may provide—(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and plan administrator." 29 U.S.C. § 1102(c)(1). To the best of my knowledge, however the September 1, 1993 Trust Agreement does not authorize the use of co-administrators, one or more of whom also are Trustees.

In sum, on several occasions, the Trustees have acted in ways that are difficult to explain other than as efforts to benefit one or more of the Appointing Parties.

* * * *

APPENDIX I

Report of Responding Expert
Leslie Kramerich, Esq.

Nos. 3:97CV294, 3:01 CV273 (E.D. Va.)

THE PITTSTON COMPANY, *et al.*

v.

UNITED STATES,

v.

HOLLAND, *et al.*,

February 15, 2002

I.
Qualifications

A copy of my resume is attached to this Responding Report.

II.
Response to January 14, 2002 Report of Mr. David Laurent

I have reviewed the January 14, 2002 report that Mr. David Laurent prepared in response to the request of Mr. Wade Massie. I have been informed by counsel for the UMWA Combined Benefit Fund and the Fund's Trustees that the litigation with respect to which Mr. Laurent prepared his report (and I have prepared this responding report) is captioned as *The Pittston Company, et al. v. United States v. Holland, et al.*, Nos. 3:97CV294, 3:01CV273 (E.D. Va.). I refer to these cases as the "*Pittston*" cases in this report.

A. Description of My Task

I have been retained to respond to certain opinions Mr. Laurent expressed in his January 14, 2002 report ("Laurent Report"). In particular, I was asked to respond to Mr. Laurent's opinion that the Coal Act gave the Trustees the power to administer the Combined Fund "with no further government oversight of any consequence . . . . " Laurent Report at 2. *See* also Laurent Report at 14 (suggesting lack of government oversight in Trustees' administration of Combined Fund). I was also asked to offer an opinion as to whether, assuming Mr. Laurent is correct that the Trustees "have acted in ways that are difficult to explain other than as efforts to benefit one or more of the Appointing Parties" (see Laurent Report Part III(G)(1)-(6)), those actions are subject to federal governmental oversight.

The twenty-five page Laurent Report contains many sections as to which I was not asked to respond, and I have not formed opinions as to those sections.

B. Grounds for My Response to Mr. Laurent's Conclusions and Information Considered in Forming My Opinions

The opinions I offer in response to Mr. Laurent are based on the specialized knowledge I have acquired over the past 18 years, in private practice and public service, addressing various aspects of the Employee Retirement Income Security Act of 1974 ("ERISA"), and, in particular, the federal government's oversight and enforcement responsibilities under ERISA. In responding to Mr. Laurent's conclusions, I have drawn on the following experiences:

- approximately five years as professional staff to Senate committees with legislative oversight of ERISA issues and as staff to the House Appropriations Committee with responsibility for funding agencies that regulate ERISA plans;

- approximately six years as an attorney in private practice advising clients facing liability under ERISA, negotiating with regulatory agencies, and helping to design corrections for issues requiring action to insure compliance to the agencies' satisfaction, first as an associate and then as a partner in the Washington, D.C., law firm of Verner, Lipfert, Bernhard, McPherson & Hand;
- more than four years as Attorney-Advisor to the Chief Negotiator of the Pension Benefit Guaranty Corporation, one of the enforcement agencies created by ERISA, responsible for protecting underfunded defined benefit pension plans; and
- more than two years as the Deputy Assistant Secretary of Labor, and then as the Assistant Secretary, heading the Pension and Welfare Benefits Administration ("PWBA"). As head of PWBA, I directed a staff of more than 700 in carrying out administrative, policy and enforcement functions under ERISA. During my tenure, the agency was responsible for overseeing more than 6.7 million private pension and welfare plans, with pension assets alone totaling nearly $4 trillion and annual health care benefit obligations of roughly $400 billion a year.

In addition to drawing upon the knowledge gained in the course of the activities and service just described, I considered the following materials in forming the opinions expressed herein: Laurent Report (Jan. 14, 2002) (Pittston 00421-445); Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722; UMWA Combined Benefit Fund Trust Document (TR20000013-29); UMWA Combined Benefit Fund Plan Document (TR20000762-791); Application for Prohibited Transaction Exemption with transmittal letter from David W. Allen, General Counsel, UMWA Health

and Retirement Funds, to Pension and Welfare Benefits Administration (March 14, 1995) (TR20001000-1027); Letter from Thomas O.S. Rand to P. Archibald Straub (July 7, 1995) (TR20000976-977); Letter from Thomas O.S. Rand to Jan Broady, PWBA, with attached memorandum (August 9, 1995) (TR20000884-908); Letter from Ivan L. Strasfeld, Director of Exemption Determinations, PWBA, to David W. Allen (February 26, 1997) (TR20000941-946).

C. My Response to Mr. Laurent's Conclusions

I disagree with Mr. Laurent's opinion that the Trustees administer the Combined Fund with no further governmental oversight." Pursuant to § 9702(a)(3)(B) and (C) of the Coal Act, the Combined Fund is an employee welfare benefit plan within the meaning of section 3(1) of ERISA and a multi-employer plan within the meaning of section 3(37) of ERISA. My review of the UMWA Combined Benefit Fund Trust Document (at TR20000018) and UMWA Combined Benefit Fund Plan Document (at TR20000764, 791) confirm that the Combined Fund is an ERISA plan. Because the Combined Fund is an ERISA plan, its trustees are subject to the terms of ERISA. As former head of the federal agency charged with overseeing ERISA plans such as the Combined Fund, I have the specialized knowledge to respond to Mr. Laurent's opinions.

PWBA within the Department of Labor has principal responsibility for administering Title I of ERISA which sets forth the standards and rules governing the conduct of plan fiduciaries. Under ERISA, fiduciaries are required, among other things, to discharge their duties solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. In discharging their duties, fiduciaries must act prudently and in accordance with the documents governing the plan, to the extent such documents are consistent with federal law. Certain transactions between an

employee benefit plan and "parties in interest", i.e., parties who may be in a position to exercise improper influence over the plan, are prohibited by ERISA.

PWBA had nearly 400 investigators in its ten regional and five district offices around the country during the time I headed PWBA. Those offices reported to the Director of PWBA's Office of Enforcement in Washington, D.C. The Director reported to the Deputy Assistant Secretary for Program Operations who in turn reported to me. At that time, PWBA was responsible for protecting more than $4.3 trillion in assets held by over five million benefit plans. Funding for PWBA's Enforcement and Compliance activities, which includes its investigators around the country, was just over $70 million in fiscal year 1999. In order to effectively leverage its limited resources, PWBA targets certain types of practices for special scrutiny and conducts self-generated review and also relies heavily on complaints from those involved with plans, namely plan participants, beneficiaries and contributing employers, who observe practices that may warrant correction.

Although PWBA seeks to protect the benefits of plan participants and beneficiaries, it is also an explicit part of PWBA's enforcement strategy to pursue investigations in some cases even where benefits do not appear to be at risk. Fiduciary breaches, self-dealing, conflicts of interest and other threats to the integrity of the system are examples of the types of violations that may warrant investigation even in the absence of demonstrated harm to participants. PWBA actively publicizes its litigation as well as the corrections it achieves in order to deter other inappropriate activity.

PWBA has the power to conduct criminal and civil investigations, to issue subpoenas, to seek recoveries of plan assets, to require that profits improperly made be disgorged, to hold fiduciaries personally liable for breaches of their statutory duties, to remove fiduciaries from roles of responsibility for

ERISA plans, to assess penalties in appropriate cases, and to refer matters to the Department of Justice, the IRS and other appropriate state or federal agencies for appropriate enforcement actions.

Complaints to PWBA investigators may be made orally or in writing. Complaining parties may request confidentiality; PWBA will attempt to avoid disclosure unless required by law. Even if confidentiality is not requested, PWBA policy is not to disclose the complainant's identity during the course of an investigation unless such disclosure is required by law. Complaints may come from a number of sources, such as individuals, news media, and other enforcement agencies. Complaining parties are not limited to the categories of parties who are authorized to bring ERISA causes of action in court. PWBA procedure calls for a case to be opened immediately upon receipt of a written complaint which the regional director feels should result in an investigation.

PWBA investigates allegations of fiduciary breaches, including, for example, alleged failures of fiduciaries to operate plans prudently and for the exclusive benefit of participants, or the use of plan assets to benefit certain related parties in interest, or the payment of duplicate, excessive and unnecessary compensation. Cases of this nature may be generated by actions of a PWBA Regional Office, or by complaints. Regional Offices will open fiduciary investigations as soon as practical after allegations of fiduciary violations deemed worthy of investigation are received. PWBA's policy is not to inform plan officials or others as to the basis or source of an investigation.

It is PWBA's policy to promote voluntary compliance with ERISA whenever possible. Corrective action includes paying amounts to restore plan losses, disgorging profits, and in some situations paying penalties. Some cases will not be considered appropriate for voluntary compliance, and will be referred to the Plan Benefit Security Division of the Office of

the Solicitor of Labor for possible litigation, or referred to the Department of Justice for consideration of potential criminal prosecution, or referred to the IRS for imposition of an excise tax or other appropriate action.

Against this extensive regulatory background, I can find no basis for concluding, as Mr. Laurent does, that the Trustees administer the Combined Fund free of governmental oversight. Twice (at 15, 19), Mr. Laurent opines that the Trustees exercised their discretion in ways that are "difficult to explain other than as efforts to benefit one or more of the Appointing Parties." I have not been asked to formulate (nor have I formulated) an opinion about what motivated the Trustees to make certain decisions; nor have I been asked to formulate (nor have I formulated) an opinion about whether the Trustees' actions, regardless of motive, were consistent with the Coal Act and/or the Trustees' fiduciary duties under ERISA. However, I am of the opinion that actions by plan fiduciaries based on improper motives are subject to PWBA review and, if determined to constitute a prohibited transaction, are subject to corrective action.

Drawing upon my experience as Assistant Secretary of Labor charged with overseeing and regulating ERISA plans, I am strongly of the view that it is not plausible to contend, as Mr. Laurent has, that any ERISA welfare benefit plan, including the Combined Fund, can be administered with no governmental oversight of any consequence. Such a view ignores the entire regulatory framework that I oversaw within the Department of Labor's Pension and Welfare Benefits Administration. My opinion is that, irrespective of what prompted the Trustees to take certain actions, the Trustees have been administering the Combined Fund within a highly regulated environment. The Combined Fund's two most basic documents—the UMWA Combined Benefit Fund Trust Document (at TR20000029) and the UMWA Combined Benefit Fund Plan Document (at TR20000791)—recognize,

on their face, that they are to be "construed, regulated and administered under Federal law."

Mr. Laurent takes particular exception (at 15-19) with six actions taken by the Trustees. None of the concerns he raises demonstrates that such trustee decisions are outside the government's oversight responsibilities under ERISA. In my view, each of the alleged "exercises of discretion" are subject to the regulatory system that governs the Trustees as ERISA plan fiduciaries.

1. "After-acquired dependents" (Laurent Report at 15-17)

In Mr. Laurent's opinion, the Trustees' decision to include "after-acquired dependents" in the Combined Fund is inconsistent with the language of the Coal Act, the trust document and a court ruling in a case called *Fawn Mining*. I have not been asked to respond to these legal conclusions. I am of the opinion that the Trustees made their decision against the backdrop of substantial government regulation and that persons who believe the Trustees made the wrong decision had ample means of protecting their interests.

By Mr. Laurent's own description (at 15-16), the Coal Act established the conditions for eligibility. And, as I noted above, the Combined Fund's Plan Document provides (at TR20000791) that it "shall be construed, regulated and administered under Federal law." If Pittston, for example, believed that the Trustees had impermissibly expanded the terms of eligibility in the November 1995 Plan Document beyond the bounds of federal law, then it could have contacted the national or regional Office of Enforcement at PWBA and raised its concern with a PWBA investigator. Likewise, Pittston could have contacted the Office of Enforcement if it believed (as Mr. Laurent apparently does) that the Trustees made the decision to include "after-acquired dependents" in the Combined Fund "to further the BCOA's

and the UMWA's interests." Laurent Report at 17. PWBA routinely investigates charges that plan fiduciaries are not complying with their statutory obligations under §§ 404 or 406 of ERISA and charges that plan fiduciaries acted to benefit parties-in-interest, rather than beneficiaries.

Certainly during my tenure at PWBA, an investigator receiving such a call would have made sufficient inquiry to understand the basis of the concern, opened a case file if the concern was deemed credible, and developed an investigative plan to pursue the matter. PWBA investigators routinely interview plan administrators and other relevant persons as part of their inquiries and obtain documents either through the cooperation of plan administrators or, when necessary, through issuance of subpoenas. If PWBA agreed with the complaining party, PWBA would then determine how to best resolve the matter, often through voluntary correction and, at times, through payment of a civil monetary award.

2. The $500 earnings limit was raised to $1,000 (Laurent Report at 17)

Mr. Laurent expresses the legal conclusion that the Trustees' decision to increase the earnings limit is inconsistent with § 9703(b) of the Coal Act. In this case, Mr. Laurent does not impute a bad motive to the Trustees, and claims only that the Trustees "never articulated why they made this change." Mr. Laurent's concern about the correctness of the Trustees' decision is nearly identical to his concern about "after-acquired dependents"—he apparently believes that the Trustees did not act in accordance with the terms of the Coal Act. This does not, in my view, demonstrate that the Trustees acted free of governmental oversight. If an employer believed that the Trustees were using plan assets to pay benefits to people who were not entitled to receive benefits because their income exceeded a certain threshold, the employer could have brought the issue to the attention of

PWBA in the same way, and with a comparable response, as I described with respect to the "after-acquired dependent" issue.

3. Seeking authority to use Combined Fund money to handle RODs (Laurent Report at 17-18)

In my view, Mr. Laurent has identified a concrete example of ERISA's regulatory regime (and governmental oversight) at work. Mr. Laurent states (at 18) that two of the Appointing Parties—the UMWA and the BCOA—asked the Trustees to "seek permission from the Department of Labor ['DOL'] to use Combined Fund assets to pay for the resolution of disputes program ('RODS') under the collectively bargained health plans," that the Trustees submitted such a request to DOL, that a dissenting Trustee "filed his own opposition to the request," and that DOL ultimately denied the Trustees' request. I can confirm based on my experience heading PWBA that parties often seek PWBA guidance on particular transactions or arrangements - just as the Trustees did in this instance. A party outlines a proposed transaction, outlines the ERISA fiduciary restrictions that may be implicated, then outlines the exemptions they believe apply.

The only opinion Mr. Laurent offers in connection with RODs is that "the fact that the Trustees sought permission in the first place is difficult to justify." In my view, Mr. Laurent is contradicting himself. He faults the Trustees for administering the Combined Fund with "no governmental oversight of any consequence," but then criticizes them for choosing to seek governmental review and approval before using plan assets to pay for the RODs program.

Having reviewed the exemption application filed by the Trustees in March 1995, I am of the view that the Trustees adhered to the precise procedure by which parties can request that an exemption be granted from ERISA's prohibited transaction rules. In my opinion, there was a clear exercise of

governmental oversight. In fact, that oversight by PWBA had significant consequences—i.e., an agency of the federal government, not the Trustees, determined whether plan assets could be used to pay for the cost of the RODs program.

4. Use of "co-counsel" (Laurent Report at 18)

It is unclear what opinion, if any, Mr. Laurent is offering with respect to the Combined Fund's use of "co-counsel." Perhaps Mr. Laurent is suggesting that the Trustees' retention of two law firms was an impermissible use of plan assets.

I have not reviewed the litigation matters with respect to which the UMWA's and the BCOA's "historic counsel" have represented the Combined Fund, and therefore can offer no opinion about the appropriateness of such an arrangement. In my opinion, it is clear that the Trustees' actions, including decisions about retention of counsel, are measured against ERISA's fiduciary standards. Also, during my tenure, PWBA became increasingly more aggressive in its scrutiny of how plan assets are used to pay for administrative expenses, including payment of legal fees. Such legal fees are not hidden from the federal government.

If beneficiaries or contributing employers believe that a plan fiduciary has misused plan assets, a process is available through which such persons or companies may raise their concerns with PWBA in the same way as I have described previously.

5. The use of co-administrators (Laurent Report at 18-19)

As is the case with respect to the Trustees' use of "co-counsel," it is unclear what opinion, if any, Mr. Laurent is offering in connection with the Combined Fund's use of "co-administrators." If beneficiaries or contributing employers believed that the "co-administrator" arrangement violated the terms of the plan document, resulted in a misuse of Combined

Fund assets, or constituted an improper dealing with a party-in-interest, such concerns are within PWBA's oversight responsibilities.

6. The Pittston Evergreen settlement (Laurent Report at 19)

Again, it is unclear what opinion, if any, Mr. Laurent is offering with respect to the Combined Fund's settlement of the *Evergreen* litigation, other than to suggest that it was inappropriate for the Trustees allegedly to "ma[k]e it clear to Pittston that the Combined Fund would not settle the case unless Pittston also agreed to dismiss separate cases it had filed against the BCOA and the UMWA." I have reviewed no documents associated with the *Evergreen* litigation or litigation between Pittston and the BCOA and/or the UMWA.

I disagree with Mr. Laurent's suggestion that the Trustees could, free of any governmental oversight or potential review, settle cases on terms that are not in the best interests of plan beneficiaries. In my opinion, ERISA's prohibited transaction requirements fully apply to plan fiduciaries' actions in settling litigation, and investigation of such alleged prohibited transactions are within PWBA's oversight responsibilities. Allegations of breaches of fiduciary duty are taken very seriously by PWBA, particularly when a charge is made that plan assets were compromised in some way.

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